

*Documents and Readings  
in American Government*





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# *Documents and Readings in American Government*

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## *National and State*

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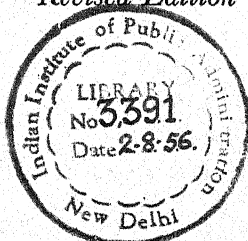
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*Revised Edition*



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## PREFACE TO REVISED EDITION

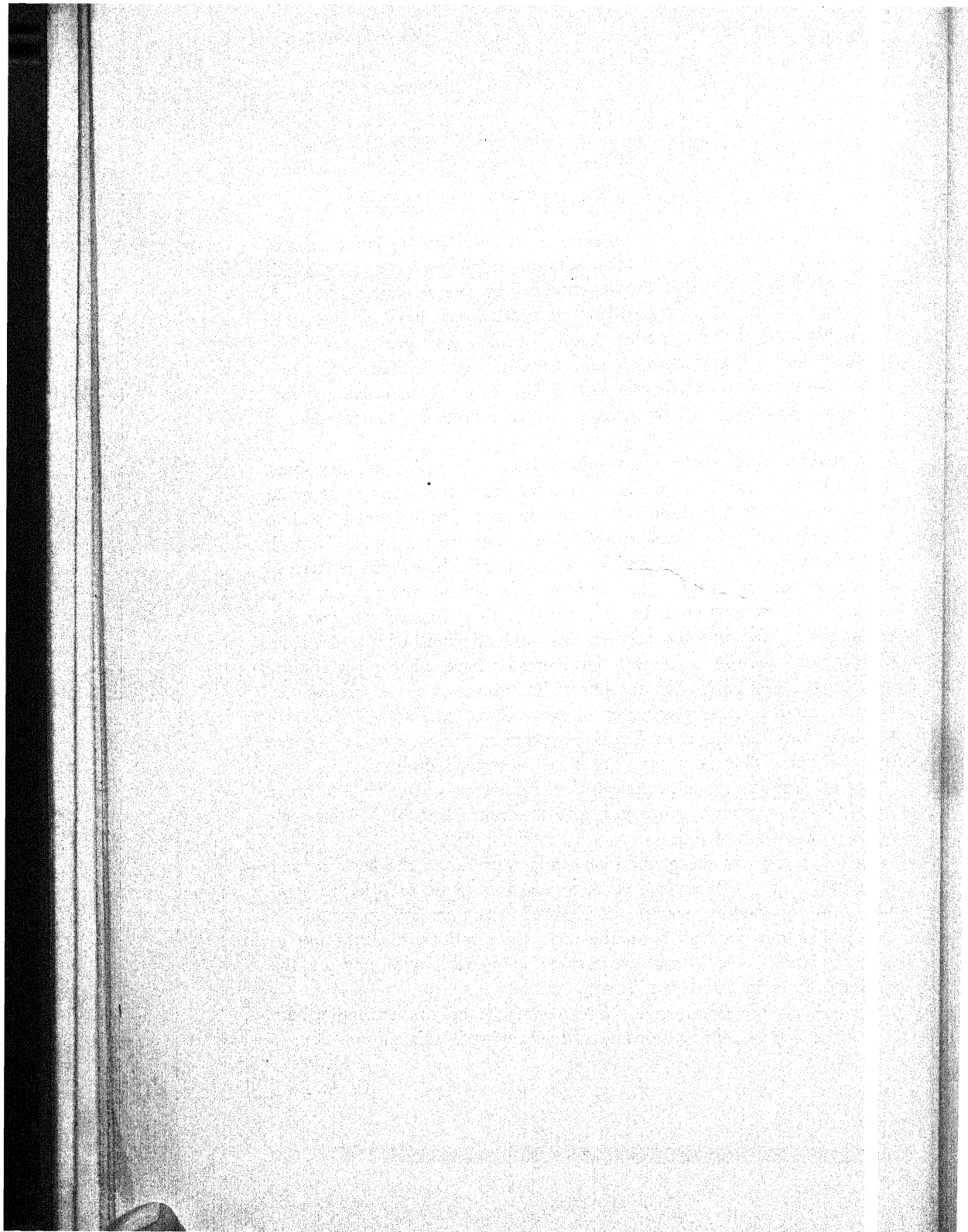
In both organization and function, government in the United States is in a continuous process of adaptation and readaptation to new conditions. It is a truism that every period is one of transition, but this is especially true of the period of twelve years which have elapsed since the appearance of the first edition of this book. This period covers the years of the great economic depression and the extraordinary expansion of governmental activity in efforts to solve the problems resulting from it. These developments have given rise to a need for the revision of this volume.

In making this revision, the editors have departed from the sharp division between national and state government to the extent of bringing together material relating to both governments in Parts I and II dealing respectively with the Constitutional Basis and with Popular Control. Some selections which appeared in the first edition have been reduced in length and others dropped out entirely in order to make room for a number of selections embodying new material. Most of the new material has to do with the organization and activities of the National Government because the newer developments have taken place for the most part in this field. On account of limitations of space and in order to make room for this new material, it has been found advisable to omit the selections dealing with Local Government which appeared in the first edition. This is not regarded as a serious disadvantage, since fewer general courses in American Government now have time to cover Local Government and, moreover, several serviceable books of materials in the local field now exist.

In other respects the general plan and purpose of the book remain the same. The editors have endeavored to continue to place the emphasis on documentary sources in preference to secondary material. It is hoped that in its new form the book will continue to be of use to college classes as collateral reading in connection with any of the standard texts in American Government.

Grateful acknowledgment is made to authors, editors, and publishers for permission to reprint new material appearing in this edition.

J. M. M.  
C. A. B.



## PREFACE TO FIRST EDITION

The present volume is the outgrowth of the authors' experience over many years in teaching large college classes in American Government at the University of Illinois. This experience has demonstrated the need of a book of documents and readings to supplement the textbook, since the size of the class renders it impracticable, even in the best equipped libraries, to send the students to the books and documents from which the material has been selected.

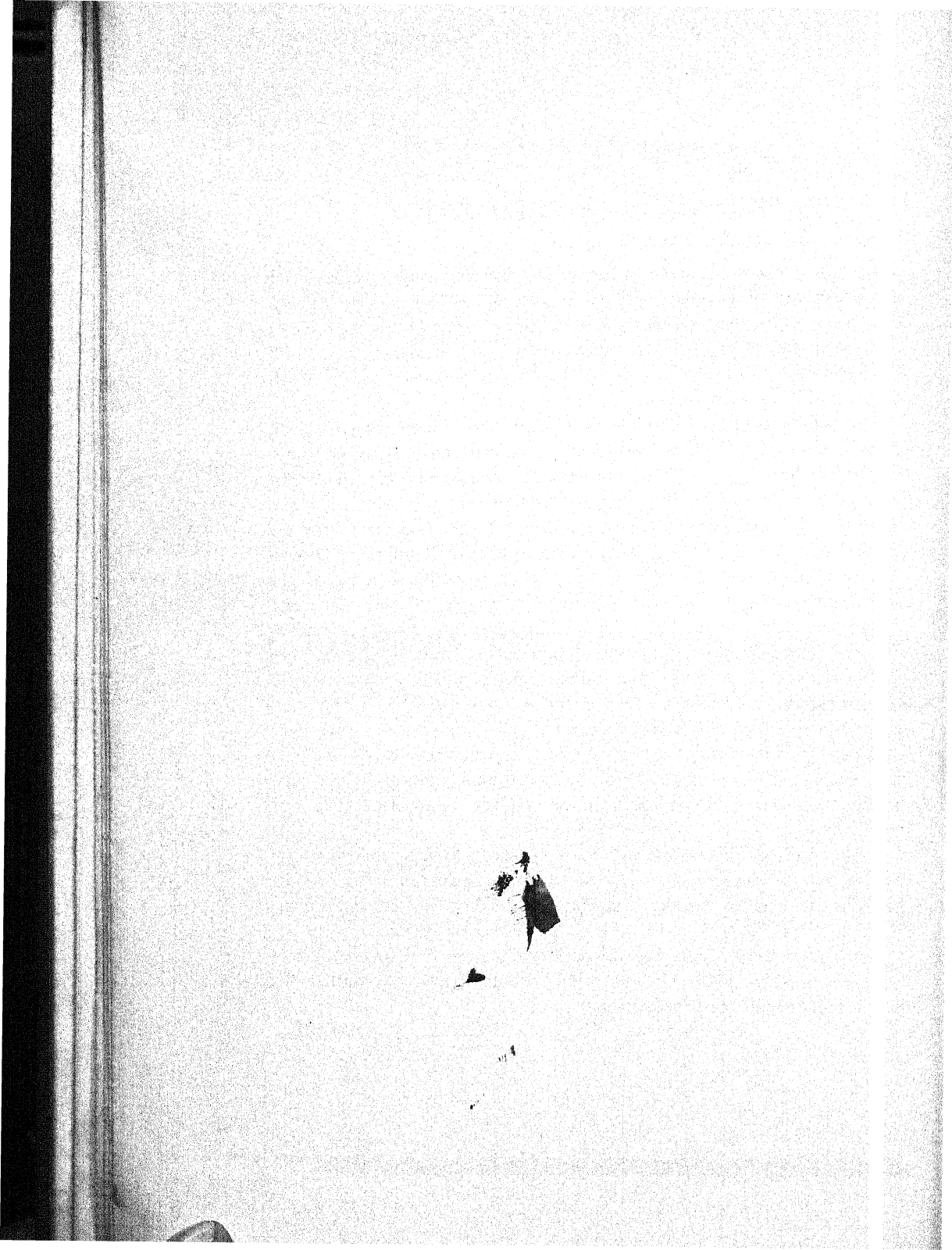
The volume covers the whole field of American government, national, state, and local, and is designed for use in connection with, and supplementary to, any of the standard texts now available in this field. The selections are intended to illustrate, amplify, and vivify the various topics treated in the textbook. The best modern and contemporary writing by the ablest authors in the field has been the source of illuminating discussions on numerous important topics. The distinctive feature of the book, however, is the emphasis placed upon primary sources and documentary material, which have been selected in preference to secondary material whenever they have been found to be available and suitable. To some extent, therefore, the volume may serve as a casebook for college classes in this field. The documents selected include such material as legislative acts, judicial opinions and decisions, executive messages and proclamations, official opinions, and proceedings of deliberative bodies. Each selection or group of selections is preceded by a brief introduction designed to enlighten the student as to its setting and significance.

It is hoped that the volume will be of assistance to large college classes in making more concrete and vivid the processes and operations of government, and in thereby arousing and holding the interest of the student.

Acknowledgments and grateful appreciation are due to the several authors, editors, and publishers who have generously permitted the reprinting of material in this volume.

J. M. M.  
C. A. B.





# TABLE OF CONTENTS

## PART I. CONSTITUTIONAL BASIS

	PAGE
CHAPTER I. COLONIAL AND REVOLUTIONARY	
ORIGINS .....	3
1. Mayflower Compact, 1620 .....	3
2. Early Attempts at Colonial Union .....	3
a. New England Confederation, 1643 .....	4
b. Albany Plan of Union, 1754 .....	8
c. Resolutions of the Stamp Act Congress, 1765 .....	11
3. Committees of Correspondence .....	13
a. Origin of Committees of Correspondence .....	13
b. Structure of Committees of Correspondence .....	14
c. Functions of the Committees of Correspondence .....	15
4. The Continental Congresses .....	16
a. Declaration and Resolves of First Continental Congress ..	16
b. The Continental Association .....	19
5. Declaration of Independence .....	23
6. Articles of Confederation .....	27
CHAPTER II. MAKING AND DEVELOPMENT OF THE	
CONSTITUTION .....	35
7. Call for Constitutional Convention .....	35
a. Report of Annapolis Convention, 1786 .....	35
b. Call by Congress .....	38
8. Plans for a Constitution .....	38
a. Virginia Plan .....	39
b. New Jersey Plan .....	41
9. Ratification of the Constitution .....	44
a. Massachusetts Act of Ratification .....	44
b. New York Circular Letter .....	46
10. National Constitutional Convention .....	48
a. Table of Legislative Applications .....	48
b. Application of Wisconsin Legislature .....	51
11. Convention System of Ratification .....	52
a. Ratification of Twenty-First Amendment .....	52
b. Ballots with respect to Prohibition Repeal .....	58
(1) Florida Ballot .....	58
(2) Illinois Ballot .....	59
12. Popular Control of Amending Process: Hawke v. Smith ..	58



	PAGE	E
CHAPTER III. THE FEDERAL SYSTEM .....	1	
13. Republican Government .....	1	
a. Definition of Republican Government .....	1	
b. Application of Federal Guaranty: <i>Luther v. Borden</i> ....	2	
14. Federal Supremacy: <i>Ableman v. Booth</i> .....	4	
15. Implied Powers: <i>McCulloch v. Maryland</i> .....	9	
16. Definition of Citizenship: <i>Wong Kim Ark Case</i> .....	4	
17. Application of the Bill of Rights .....	7	
18. Freedom of Speech and Press .....	0	
a. <i>Minnesota Press Case</i> .....	1	
b. <i>Hague Case</i> .....	8	
19. Admission of States: Omnibus Enabling Act .....	1	
20. State Law and Treaties .....	5	
a. <i>San Francisco School Question</i> .....	6	
b. Proposed Ohio Tax on Imported Wines .....	0	
CHAPTER IV. INTERSTATE RELATIONS .....	2	
21. Extradition: Letter of Governor Ferguson to Governor Fuller .....	2	
22. Privileges and Immunities: <i>Paul v. Virginia</i> .....	3	
23. Compacts .....	4	
a. Procedure of Negotiating Compacts .....	4	
b. Colorado River Compact .....	8	
c. Minimum Wage Compact .....	12	
24. Crime Control .....	17	
a. Crime Prevention Compact Act .....	17	
b. Crime Prevention Compact .....	18	
c. Lindbergh Law .....	19	
d. Warning of President Roosevelt .....	21	
25. Council of State Governments .....	22	
a. Illinois Commission on Interstate Cooperation .....	22	
b. Resolutions on Interstate Trade Barriers .....	25	
PART II. POPULAR CONTROL		
CHAPTER V. THE PARTY SYSTEM .....	131	
26. Importance of the Political Party .....	131	
a. View of Washington .....	131	
b. View of Coolidge .....	134	
27. Legal Position of the Political Party .....	134	
a. Preamble to Oregon Primary Election Law of 1905 ....	135	
b. Speech of Elihu Root .....	136	
c. Regulation of State Party Organization in Illinois ....	137	
28. Federal Regulation of Political Parties .....	145	
a. <i>Newberry Case</i> .....	146	

	PAGE
b. Federal Corrupt Practices Act .....	149
c. Hatch Act .....	154
29. Regulation of National Party Organization .....	157
a. Composition and Powers of Republican National Committee .....	157
b. Composition and Powers of Democratic National Committee .....	159
c. Selection of National Committeeman in Nebraska .....	160
d. Selection of National Committeeman in West Virginia .....	160
30. Party Slate-Making .....	161
a. Slate-Making in Illinois .....	161
b. Proposal Conventions in South Dakota .....	164
31. Primary Election Ballots .....facing	167
a. Republican Primary Ballot in Illinois .....facing	167
b. Republican Primary Ballot in South Dakota .....facing	167
c. Open Primary Ballot in Minnesota .....facing	167
CHAPTER VI. SUFFRAGE AND ELECTIONS .....	168
32. Control of Suffrage .....	168
a. Texas White Primary Case .....	168
b. Reasonable Understanding Provisions in Louisiana ....	169
33. Suffrage Qualifications .....	171
a. Early Suffrage Provisions in Connecticut .....	171
b. Suffrage Provisions in Illinois .....	172
34. Federal Elections Law .....	173
35. Types of Election Ballots .....facing	176
a. New York Ballot of 1926 .....facing	176
b. Illinois Ballot of 1936 .....facing	177
36. Voting Machine: Diagram of Voting Machine in New York	177
CHAPTER VII. THE INITIATIVE, REFERENDUM, AND RECALL .....	178
37. The Initiative and Referendum .....	178
a. The Initiative and Referendum in South Dakota .....	178
b. The Initiative and Referendum in Massachusetts .....	179
38. The Illinois Public Policy Law .....	187
39. Problems of the Initiative and Referendum .....	188
40. Sample Ballots .....	195
a. Ballot for Constitutional Amendments .....facing	194
b. Ballot for Initiated Laws .....facing	195
c. Ballot for Referred Laws .....facing	195
41. National Referendum on War .....	195
a. Ludlow Proposal for Constitutional Amendment .....	196
b. LaFollette Proposal for Advisory Referendum .....	196
c. View of President Roosevelt .....	198

42. The Recall .....	PAGE 199
a. The Recall in Arizona .....	199
b. Recall of Members of Congress .....	200

### PART III. NATIONAL GOVERNMENT

#### CHAPTER VIII. THE PRESIDENT: SELECTION AND TENURE

43. The Two-Term Tradition .....	207
a. Statement of Washington .....	207
b. Statement of Jefferson .....	208
c. Statement of Roosevelt .....	209
d. Declaration of House of Representatives .....	210
44. Presidential Succession Act of 1886 .....	210
45. Presidential Inability .....	211
a. Inability of President Wilson .....	211
b. Report of Senate Committee .....	214
c. View of Vice President Marshall .....	215
46. Presidential Ballot .....	217
a. Act of Congress with respect to Presidential Electors .....	217
b. Illinois Law with respect to Presidential Electors .....	21
47. Minority Presidents .....	25
48. Call for National Convention .....	26
a. Call for Republican Convention, 1936 .....	27
b. Call for Democratic Convention, 1936 .....	31
49. Presidential Primary .....	32
a. Presidential Primary Law of Illinois .....	32
b. Presidential Primary Law of Massachusetts .....	33
50. Conduct of the National Convention .....	25
a. Speech Nominating Governor Lowden, 1920 .....	25
b. Demonstrations in Democratic Convention, 1924 .....	29
c. Nomination of Senator Harding, 1920 .....	23

#### CHAPTER IX. THE PRESIDENT: POWERS AND FUNCTIONS

51. Power of Patronage .....	26
a. President Lincoln's Use of Patronage .....	26
b. Method of Handling Patronage under President Mc- Kinley .....	24
c. President Harding and Patronage .....	25
52. Senatorial Courtesy .....	25
a. Custom of Senatorial Courtesy .....	25
b. Roberts Case .....	25
c. Borah Resolution .....	25

	PAGE
53. Removal Power .....	258
a. Myers Case .....	258
b. Humphrey Case .....	264
54. Enforcement of Law .....	267
a. Letter of President Wilson to Attorney General McReynolds, with respect to the Anti-Trust Law .....	267
b. Letter of President Harding to Secretary Mellon, with respect to Prohibition Enforcement .....	268
c. President Harding and the Merchant Marine Act of 1920 .....	268
d. Joint Resolution with respect to Prosecution of Oil Leases .....	269
55. Ordinance Power .....	270
a. Proclamation of President Wilson with respect to War-Time Prohibition .....	271
b. Executive Order of President Coolidge with respect to the Foreign Service .....	272
c. Departmental Order with respect to Neutrality .....	274
56. Purpose of Veto .....	275
a. View of Hamilton .....	275
b. President Wilson's Veto of Budget Bill .....	278
c. President Wilson's Veto of Immigration Bill .....	279
57. Item Veto .....	281
a. President Hayes' Protest against Riders .....	282
b. Vandenberg-Roosevelt Correspondence .....	284
58. Threat of Veto: Letter of President Roosevelt to Senator Harrison .....	286
59. Administration Measures: Senate Debate .....	287
60. White House Organization .....	291
a. Proposals of the President's Committee on Administrative Management .....	291
b. White House Reorganization .....	293
CHAPTER X. THE CABINET .....	299
61. Origin of the Cabinet: First Cabinet Meeting .....	299
62. Confirmation of Cabinet Appointments .....	300
a. Debate in Senate .....	300
b. Statement of President Coolidge .....	314
c. Coolidge-Warren Correspondence .....	314
63. Removal of Cabinet Members .....	315
a. Senate Resolution of February 11, 1924 .....	316
b. Senate Debate on Denby Resolution .....	317
c. Statement of President Coolidge .....	325
d. Resignation of Secretary Denby .....	326
64. The Vice President and the Cabinet .....	327
a. View of Jefferson .....	328

b. View of Bryan .....	PA ; 32
c. View of Vice President Marshall .....	32
d. View of Vice President Dawes .....	33
65. The Cabinet and Congress .....	33
a. Message of President Taft, 1912 .....	33
b. Couzens Bill, 1926 .....	33
CHAPTER XI. THE ADMINISTRATION AND THE CIVIL SERVICE .....	
66. The President and the Administration: Protest of President Jackson against Senate Resolution of Censure .....	335
67. Congressional Investigations .....	338
a. Letter of Secretary Mellon to President Coolidge .....	339
b. Message of President Coolidge to the Senate .....	340
c. Power of Investigation: McGrain v. Daugherty .....	341
68. Control of Administrative Commissions .....	343
a. Appointment of David J. Lewis to Tariff Commission: Letter of Commissioner Culbertson to Commissioner Costigan .....	344
b. Proposal for Reorganization: Report of the President's Committee on Administrative Management .....	346
69. Administrative Reorganization .....	352
a. Proposal of the President's Committee on Administrative Management .....	352
b. Reorganization Act of 1939 .....	358
c. Plans of Reorganization .....	365
70. Establishment of the Merit System .....	376
a. Civil Service Act of 1883 .....	376
b. Classification Act of 1923 .....	380
71. Extension of the Merit System .....	383
a. Extension by Act of Congress: Act of June 25, 1938 ...	384
b. General Extension by President Roosevelt: Executive Order of June 24, 1938 .....	385
72. Working of the Civil Service .....	388
a. Report of Senate Committee .....	389
b. Proposal of President's Committee on Administrative Management .....	396
CHAPTER XII. CONGRESS: SELECTION AND STRUCTURE .....	
73. Seating of Members .....	407
a. Joint Resolution of Illinois Legislature regarding Smith Case .....	408
b. Senate Resolution regarding Smith Case .....	410
c. Statement of Governor Small .....	412



*Table of Contents*

xv

	PAGE
74. Members of Congress and Public Office: the Smoot-Burton Case .....	413
a. Opinion of Attorney General Daugherty .....	414
b. Report of Judiciary Committee .....	418
75. Reapportionment .....	421
a. Apportionment Act of 1911 .....	422
b. Apportionment Act of 1929 .....	423
c. Apportionment of 1930 .....	424
d. Illinois Redistricting Case .....	426
76. Instruction of Members of Congress .....	429
a. View of Senate, 1791 .....	430
b. Instructions of New York Legislature, 1836 .....	430
c. Instructions of Democratic Party of South Carolina, 1926 .....	432
CHAPTER XIII. CONGRESS: WORKING METHODS AND PROCEDURE .....	433
77. Party Caucus .....	433
a. Democratic House Caucus Rules .....	433
b. Proceedings of Democratic House Caucus .....	434
c. Proceedings of Republican House Caucus .....	436
78. Revolution of 1910-11 .....	437
a. Norris Resolution .....	438
b. House Debate .....	438
79. Selection of Committees .....	442
a. Senate Rules with respect to Selection of Committees ..	442
b. House Rules with respect to Selection of Committees ...	443
c. Party Methods in Selection of Committees .....	443
80. Conference Committee .....	447
a. Composition of Conference Committee .....	447
b. Power of Conference Committee .....	452
81. Filibustering .....	455
a. Round-Robin Statement relative to Armed Merchant Ship Bill .....	455
b. Justification of Filibustering .....	455
82. Debate Rules .....	457
a. House Debate Rules .....	457
b. Special Rule with respect to Ship Subsidy Bill .....	458
c. Senate Cloture Rule .....	458
d. Unanimous Consent Agreement .....	459
83. Expert Assistance .....	462
a. Legislative Reference Service: Report of Librarian of Congress .....	462
b. Legislative Counsel: Account by Frederic P. Lee .....	466

	PAC
84. Amount of Legislation .....	47
a. Amount of Legislation, 1789-1925 .....	48
b. Work of the House of Representatives .....	48
CHAPTER XIV. THE JUDICIAL SYSTEM .....	48
85. Congress and the Courts .....	48
a. Act Decreasing Size of Supreme Court .....	48
b. Act Creating Circuit Courts of Appeals .....	48
c. Act Abolishing Commerce Court .....	48
86. Character of Supreme Court Appointments .....	48
a. View of Seward .....	48
b. View of President Roosevelt .....	49
87. Judicial Review .....	49
a. Constitutional Basis: Marbury v. Madison .....	49
b. Extent of Judicial Review: Report of Senate Committee .....	49
88. The Courts and Social Policy .....	50
a. Income Tax Cases .....	50
b. Minimum Wage Cases .....	50
c. View of President Theodore Roosevelt .....	50
89. Proposals for Modification of Judicial Review .....	50
a. Recall of Judicial Decisions .....	50
b. LaFollette Proposal .....	50
c. Borah Proposal .....	50
90. Judicial Reorganization .....	50
a. Proposal of President Roosevelt .....	50
b. View of Chief Justice Hughes .....	51
CHAPTER XV. TAXATION AND FINANCE .....	51
91. Power to Tax Government Instrumentalities .....	51
a. Proposal of President Roosevelt .....	51
b. Decision of Supreme Court: Graves v. New York .....	52
92. Conflicting Taxation .....	53
a. Table of Conflicting Taxation .....	<i>facing</i> 53
b. Proposal of Governor Lehman .....	53
c. Proposal of Mayor LaGuardia .....	53
93. Relation between Taxing Power and Police Power .....	54
a. Oleomargarine Case .....	54
b. Child Labor Tax Case .....	55
94. The Budget System: Budget and Accounting Act of 1921 .....	55
95. Powers and Position of the Comptroller General .....	55
a. Statement by Comptroller General McCarl .....	55
b. Recommendations of the President's Committee on Administrative Management .....	56

	PAGE
CHAPTER XVI. REGULATION OF COMMERCE .....	571
96. Scope of Commerce Power .....	571
a. Meaning of Commerce .....	571
b. Doctrine of Expanding Power .....	573
97. Rule of Reason .....	574
98. Relation between Interstate and Intrastate Commerce .....	577
99. Relation between Commerce Power and Police Power .....	578
a. First Child Labor Case .....	579
b. Doctrine of Direct and Indirect Interference .....	582
CHAPTER XVII. FOREIGN AFFAIRS .....	585
100. Policy of Non-Entanglement in Europe: Washington's Farewell Address .....	585
101. The Monroe Doctrine .....	586
a. Original Monroe Doctrine .....	587
b. Roosevelt Corollary .....	588
c. Magdalena Bay Resolution .....	589
d. Wilson Interpretation .....	589
e. Clark Memorandum .....	590
f. Good Neighbor Policy .....	590
g. Roosevelt Doctrine of Continentalization .....	590
h. Buenos Aires Convention .....	591
102. Executive Agreements .....	591
a. Protocol with Spain, 1898 .....	592
b. Cancellation of Lansing-Ishii Agreement .....	593
103. Policy of Neutrality .....	594
a. Washington's Proclamation of 1793 .....	595
b. Wilson's Proclamation of 1914 .....	596
c. Neutrality Act of 1939 .....	599
104. The President's Control of Foreign Relations: U. S. v. Curtiss-Wright Export Corporation .....	611
105. Open Door Policy: Circular Note of Secretary Hay .....	614
106. Policy with respect to Aggression .....	615
a. Doctrine of Non-Recognition .....	615
b. Proposal for Quarantining Aggressors .....	616
107. Senate Reservations to the League of Nations .....	618
108. The Reorganized Foreign Service .....	622
109. Outlawry of War: Briand-Kellogg Pact .....	626
CHAPTER XVIII. GOVERNMENT OF TERRITORIES AND POSSESSIONS .....	628
110. Northwest Ordinance .....	628
111. Insular Cases .....	634
a. Doctrine of Incorporated and Unincorporated Territory .....	634



b. Doctrine of Formal and Fundamental Constitutional Provisions .....	18
112. District of Columbia .....	3
a. Organic Act of 1878 .....	4
b. Capper Proposal .....	6
113. Status of the Philippines .....	0
a. Philippine Independence Act .....	0
b. Philippine Constitution .....	2

#### PART IV. STATE GOVERNMENT

CHAPTER XIX. THE STATE CONSTITUTION .....	6
114. Provision for Constitutional Convention .....	6
a. Constitutional Provision in Illinois .....	6
b. Power of Legislature in North Dakota: Opinion of Attorney General Langer .....	6
115. Call for a Constitutional Convention .....	6
a. Legislative Resolution of Submission .....	6
b. Governor's Proclamation .....	6
c. Legislative Convention Act .....	6
116. Address of Submission .....	68
117. The Constitutional Convention of Massachusetts .....	68
CHAPTER XX. THE LEGISLATURE: SELECTION AND ORGANIZATION .....	69
118. The Unicameral Legislature .....	69
a. Nebraska Unicameral Amendment of 1934 .....	69
b. Argument of Senator Norris .....	69
119. Legislative Reapportionment .....	70
a. Plan for Reapportionment in Illinois: Proposed Constitution of 1922 .....	70
b. Power to Compel Reapportionment: <i>Fergus v. Marks</i> ..	70
120. Minority Representation in Illinois .....	70
121. The Split Session in California .....	70
CHAPTER XXI. THE LEGISLATURE: WORK AND METHODS .....	705
122. Constitutional Limitations on Special Legislation .....	705
123. Legislative Procedure in Massachusetts .....	706
124. The Lobby .....	713
a. The Regulation of Lobbying .....	713
b. The Wisconsin Anti-Lobbying Law .....	717
125. Legislative Reference Bureaus .....	719
126. Problems of Legislative Organization and Work .....	725
127. The Legislative Council .....	736

*Table of Contents*

xix

	PAGE
CHAPTER XXII. THE GOVERNOR .....	746
128. The Governor's Message .....	746
129. Call for a Special Session .....	747
130. The Item Veto and the Budget System .....	749
a. Exercise of Item Veto .....	749
b. Item Veto and State Budget .....	750
131. Initiative in Legislation .....	756
a. Administration Measures in Illinois .....	756
b. Model Constitution Plan .....	758
132. The Overburdened Governor .....	759
a. Governor Smith, on "How We Ruin Our Governors" ..	759
b. Arch Mandel, on "How to Save Our Governors from Ruin" .....	763
CHAPTER XXIII. STATE ADMINISTRATION .....	765
133. Administrative Reorganization .....	765
a. Administrative Reorganization in Illinois .....	765
b. Cabinet System in New York .....	771
134. Principles Underlying Administrative Reorganization .....	774
a. Report of New York Reconstruction Commission .....	774
b. F. W. Coker, on Dogmas of Administrative Reform ...	778
135. Administrative Reorganization by Constitutional Amend- ment .....	781
a. The Massachusetts Amendment .....	781
b. The New York Amendment .....	782
CHAPTER XXIV. THE STATE JUDICIARY .....	785
136. The Position of the Judge .....	785
137. The Selection of Judges .....	788
a. Recommendations of the Cleveland Bar Association Committee .....	788
b. Recommendations of Cleveland Survey of Criminal Justice .....	791
c. The California Plan .....	793
138. The Reform of Judicial Procedure: Report of Missouri Crime Survey .....	794
139. Newer Developments in the Administration of Justice .....	797
a. Small Claims Courts .....	797
b. Conciliation .....	800
c. Arbitration .....	805
140. The Grand Jury .....	806
141. State Judicial Councils .....	810
CHAPTER XXV. STATE FINANCE .....	812
142. The Custody of State Funds .....	812

143. The Trend of State Expenditures .....	15	GE
144. The State Budget .....	18	
a. The Maryland Budget Amendment .....	19	
b. The New York Budget Amendment .....	22	
145. Financial Methods in Illinois .....	4	
a. Functions of Department of Finance .....	4	
b. Working of the Budget System .....	8	
CHAPTER XXVI. ECONOMIC AND SOCIAL PROBLEMS .....	8	
146. The State Police Power .....	8	
a. Scope of the Police Power: <i>Barbier v. Connolly</i> .....	8	
b. Police Power and Individual Liberty: <i>Lochner v. New York</i> .....	8	
c. Proposal to Abandon the Police Power Doctrine: <i>Tyson v. Banton</i> .....	8	
147. The Problem of Social Security .....	8	
148. Minimum Wage Legislation .....	8	
INDEX .....	8	

**PART I**  
**CONSTITUTIONAL BASIS**



## CHAPTER I

### COLONIAL AND REVOLUTIONARY ORIGINS

#### 1. MAYFLOWER COMPACT, 1620

The Pilgrim Fathers, just before landing on Plymouth Rock in November, 1620, drew up an agreement or compact, under the terms of which a body politic was organized and a simple form of government established. This compact is notable, therefore, as the first charter for a self-governing community within this country, drawn up by the people themselves of the community concerned.

[Bradford, *History of Plymouth Plantation*, in Massachusetts Historical Collections, Fourth Series, vol. III, pp. 89-90.]

In the name of God, Amen. We whose names are underwritten, the loyall subjects of our dread soveraigne Lord, King James, by the grace of God, of Great Britaine, Franc, & Ireland king, defender of the faith &c., haveing undertaken, for the glorie of God, and advancemente of the Christian faith, and honour of our king & countrie, a voyage to plant the first colonie in the Northerne parts of Virginia, doe by these presents solemnly & mutually in the presence of God, and one of another, covenant & combine our selves together into a civill body politick, for our better ordering & preservation & furtherance of the ends aforesaid; and by vertue hearof to enacte, constitute, and frame such just & equall lawes, ordinances, acts, constitutions, & offices, from time to time, as shall be thought most meete & convenient for the generall good of the Colonie, unto which we promise all due submission and obedience. In witness whereof we have hereunder subscribed our names at Cape-Codd the 11. of November, in the year of the raigne of our soveraigne Lord, King James, of England, France & Ireland the eighteenth, and of Scotland the fiftie fourth. Ano: Dom. 1620.

#### 2. EARLY ATTEMPTS AT COLONIAL UNION

Suggestions for a colonial union of some sort were made as early as 1637, but not until 1643 was it possible to come to a definite agreement. In that year the four colonies of Plymouth, Massachusetts Bay, Connecticut, and New Haven, having in view especially the danger of an Indian war, organized the New England Confederation. Rhode Island later sought but was refused admission, and in 1662 the number of members was reduced to three by the union of New Haven with Connecticut. The Confederation continued in existence, however, until 1684. With



its passing there were renewed suggestions for the union of all the colonies, which resulted in 1754 in an official conference at Albany and the formulation of a comprehensive plan of union drafted chiefly by Franklin. The proposal was, however, completely acceptable to either the colonies or the British government, and was never ratified. The Stamp Act Congress of 1765 represents, not an attempt at governmental union, but rather an effort to make common protest against it to seek redress for a specific grievance. It is significant, however, as indicating the growing readiness of the colonists to act together on matters of common concern, and the resolutions drawn up by the Congress are especially important as a careful statement by the colonists of the "rights of Englishmen," to which they believed themselves entitled.

#### a. New England Confederation, 1643

[MacDonald, *Documentary Source-Book of American History, 1606-1926* (The Macmillan Company), pp. 46-50.]

Whereas we all came into these parts of *America*, with one and the same end and ayme, namely, to advance the Kingdome of our Lord Jesus Christ, and to enjoy the liberties of the Gospel, in purity with peace; and whereas in our settling (by a wise providence of God) we are further dispersed upon the Sea-Coasts, and Rivers, then was first intended, so that we cannot (according to our desire) with convenience communicate in one Government, and Jurisdiction; and whereas we live encompassed with people of severall Nations, and strange languages, which hereafter may prove injurious to us, and our posterity And foreasmuch as the Natives have formerly committed sundry insolencies and outrages upon severall Plantations of the English, and have of late combined against us. And seeing by reason of the said distractions in *England*, which they have heard of, and by which they know we are hindred both from that humble way of seeking advice, and reaping those comfortable fruits of protection which, at other times, we might well expect; we therefore doe conceive it our bounden duty, without delay, to enter into a present Consotiation amongst our selves, for mutuall help and strength in all our future concernments, that, as in Nation, and Religion, so, in other respects, we be, and continue, One, according to the tenour and true meaning of the ensuing Articles.

I. Wherefore it is fully Agreed and Concluded by and between the parties, or Jurisdictions [of Massachusetts, Plymouth, Connecticut and New Haven] That they all be, and henceforth be called by the name of, *The United Colonies of New-England*.

II. The said United Colonies for themselves, and their posterities doe joyntly and severally hereby enter into a firme and perpetuall league of friendship and amity, for offence and defence, mutuall advice and suc-

cour, upon all just occasions, both for preserving and propagating the truth, and liberties of the Gospel, and for their own mutuall safety, and welfare.

III. It is further agreed, That the Plantations which at present are, or hereafter shall be settled within the limits of the *Massachusetts*, shall be forever under the Government of the *Massachusetts*. And shall have peculiar Jurisdiction amongst themselves, as an intire body; and that *Plimouth*, *Connecticut*, and *New-Haven*, shall each of them, in all respects, have the like peculiar Jurisdiction, and Government within their limits. And in reference to the Plantations which already are settled, or shall hereafter be erected and shall settle within any of their limits respectively, provided that no other Jurisdiction shall hereafter be taken in, as a distinct head, or Member of this Confederation, nor shall any other either Plantation, or Jurisdiction in present being, and not already in combination, or under the Jurisdiction of any of these Confederates, be received by any of them, nor shall any two of these Confederates, joyned in one Jurisdiction, without consent of the rest. . . .

IV. It is also by these Confederates agreed, That the charge of all just Wars, whether offensive, or defensive, upon what part or Member of this Confederation soever they fall, shall both in men, provisions, and all other disbursements, be born by all the parts of this Confederation, in different proportions, according to their different abilities, in manner following, namely, That the Commissioners for each Jurisdiction, from time to time, as there shall be occasion, bring a true account and number of all the Males in each Plantation, or any way belonging to, or under their severall Jurisdictions, of what quality, or condition soever they be, from sixteen years old, to threescore, being inhabitants there. And that according to the different numbers, which from time to time shall be found in each Jurisdiction, upon a true, and just account, the service of men, and all charges of the war, be born by the poll: Each Jurisdiction, or Plantation, being left to their own just course, and customs, of rating themselves, and people, according to their different estates, with due respect to their qualities and exemptions among themselves, though the Confederation take no notice of any such priviledge. And that, according to the different charge of each Jurisdiction, and Plantation, the whole advantage of the War (if it please God so to blesse their endeavours) whether it be in Lands, Goods, or persons, shall be proportionably divided among the said Confederates.

V. It is further agreed, That if any of these Jurisdictions, or any Plantation under, or in Combination with them, be invaded by any enemy whomsoever, upon notice, and request of any three Magistrates of that



Jurisdiction so invaded. The rest of the Confederates, without any further meeting or expostulation, shall forthwith send ayde to the Confederate in danger, but in different proportion, namely the *Massachusetts* one hundred men sufficiently armed, and provided for such a service, and journey. And each of the rest five and forty men, so armed and provided, or any lesse number, if lesse be required, according to this proportion. But if such a Confederate may be supplied by their next Confederate, not exceeding the number hereby agreed, they may crave help there, and seek no further for the present. The charge to be born, as in this Article is expressed. And at their return to be victualled, and supplied with powder and shot (if there be need) for their journey by the Jurisdiction which employed, or sent for them. . . . But in any such case of sending men for present ayde, whether before or after such order or alteration, it is agreed, That at the meeting of the Commissioners for this Confederation, the cause of such war or invasion, be duly considered, and if it appear, that the fault lay in the party so invaded, that then, the Jurisdiction, or Plantation, make just satisfaction, both to the invaders, whom they have injured, and bear all the charges of the war themselves. . . .

And further, if any Jurisdiction see any danger of an invasion approaching, and there be time for a meeting, That in such case, the Magistrates of that Jurisdiction may summon a meeting, at such convenient place, as themselves shall think meet, to consider, and provide against the threatened danger. . . .

VI. It is also agreed, That for the managing and concluding of all affaires proper to, and concerning the whole Confederation, two Commissioners shall be chosen by, and out of the foure Jurisdictions, namely two for the *Massachusetts*, two for *Plimouth*, two for *Connecticut*, and two for *New-haven* being all in Church-fellowship with us, which shall bring full power from their severall generall Courts respectively, to hear, examine, weigh, and determine all affaires of war, or peace, leagues, aydes, charges, and numbers of men for war, division of spoyles, or whatsoever is gotten by conquest, receiving of more confederates, or Plantations into Combination with any of these Confederates, and all things of like nature, which are the proper concomitants, or consequences of such a Confederation, for amity, offence, and defence, not intermeddling with the Government of any of the Jurisdictions, which by the third Article, is preserved intirely to themselves. . . . It is further agreed That these eight Commissioners shall meet once every year, besides extraordinary meetings, according to the fifth Article to consider, treat, and conclude of all affaires belonging to this Confederation, which meeting

shall ever be the first *Thursday* in *September*. And that the next meeting after the date of these presents, which shall be accounted the second meeting, shall be at *Boston* in the *Massachusetts*, the third at *Hartford*, the fourth at *New-haven*, the fifth at *Plimouth*, the sixth and seventh at *Boston*; and then *Hartford*, *New-haven*, and *Plymouth*, and so in course successively. If in the mean time, some middle place be not found out, and agreed on, which may be commodious for all the Jurisdictions.

. . . . .

VIII. It is also agreed, That the Commissioners for this Confederation hereafter at their meetings, whether ordinary or extraordinary, as they may have Commission or opportunity, doe endeavour to frame and establish Agreements and Orders in generall cases of a civil nature, wherein all the Plantations are interested, for preserving peace amongst themselves, and preventing (as much as may be) all occasions of war, or differences with others, as about the free and speedy passage of Justice in each Jurisdiction, to all the Confederates equally, as to their own, receiving those that remove from one Plantation to another, without due Certificates, how all the Jurisdictions may carry it towards the *Indians*, that they neither grow insolent, nor be injured without due satisfaction, least War break in upon the Confederates, through such miscarriages. It is also agreed, That if any Servant run away from his Master, into any other of these Confederated Jurisdictions, That in such case, upon the Certificate of one Magistrate in the Jurisdiction, out of which the said Servant fled, or upon other due proof, the said Servant shall be delivered either to his Master, or any other that pursues, and brings such Certificate, or proof. And that upon the escape of any Prisoner whatsoever, or fugitive, for any Criminall Cause, whether breaking Prison, or getting from the Officer, or otherwise escaping, upon the Certificate of two Magistrates of the Jurisdiction out of which the escape is made, that he was a prisoner or such an offendor, at the time of the escape. The Magistrates, or some of them, of that Jurisdiction where for the present the said prisoner or fugitive abideth, shall forthwith grant such a Warrant, as the case will bear, for the apprehending of any such person, and the delivery of him into the hand of the Officer, or other person who pursueth him. And if help be required for the safe returning of any such offendor, it shall be granted unto him that craves the same, he paying the charges thereof.

IX. And for that the justest Wars may be of dangerous consequence, especially to the smaller Plantations in these United Colonies, it is agreed, That neither the *Massachusetts*, *Plymouth*, *Connecticut*, nor *New-Haven*,

nor any of the Members of any of them, shall at any time hereafter begin to undertake or engage themselves, or this Confederation, or any part thereof in any War whatsoever (sudden exigents with the necessary consequences thereof excepted, which are also to be moderated, as much as the case will permit) without the consent and agreement of the forenamed eight Commissioners, or at least six of them, as in the sixth Article is provided. . . .

XI. It is further agreed, That if any of the Confederates shall hereafter break any of these presents Articles, or be any other way injurious to any one of the other Jurisdictions such breach of Agreement, or injury shall be duly considered, and ordered by the Commissioners for the other Jurisdictions, that both peace, and this present Confederation, may be entirely preserved without violation.

#### b. Albany Plan of Union, 1754

[MacDonald, *Select Charters Illustrative of American History* (The Macmillan Company), pp. 254-257.]

PLAN of a proposed UNION of the several Colonies of Massachusetts Bay, New Hampshire, Connecticut, Rhode Island, New York, New Jerseys, Pennsylvania, Maryland, Virginia, North Carolina, and South Carolina, for their mutual defence and security, and for extending the British Settlements in North America.

That humble application be made for an Act of the Parliament of Great Britain, by virtue of which, one General Government may be formed in America, including all the said Colonies, within, and under which Government each Colony may retain its present constitution, except in the particulars wherein a charge [*change*] may be directed by the said Act, as hereafter follows.

That the said General Government be administered by a president General, to be appointed & supported by the Crown, and a grand Council to be chosen by the representatives of the people of the several Colonies meet [*met*] in their respective assemblies.

That within      Months after the passing of such Act, The house of representatives in the several Assemblies, that Happen to be sitting within that time or that shall be specially for that purpose convened, may and shall choose, Members for the Grand Council in the following proportions,

that is to say :

Massachusetts Bay .....	7.
New Hampshire .....	2.
Connecticut .....	5.
Rhode Island .....	2.
New York .....	4.
New Jerseys .....	3.
Pennsylvania .....	6.
Maryland .....	4.
Virginia .....	7.
North Carolina .....	4.
South Carolina .....	4.
	—
	48.

Who shall meet for the present time at the City of Philadelphia in Pennsylvania, being called by the President General as soon as conveniently may be after his appointment.

That there shall be a New Election of the Members of the Grand Council every three years, and on the death or resignation of any Member, his place should be supplied by a new choice at the next sitting of the Assembly of the Colony he represented.

That after the first three years, when the proportion of money arising out of each Colony to the General Treasury can be known, the number of Members to be chosen, for each Colony shall from time to time in all ensuing Elections be regulated by that proportion (yet so as that the Number to be chosen by any one province be not more than seven nor less than two).

That the Grand Council shall meet once in every year, and oftener if occasion require, at such time and place as they shall adjourn to at the last preceeding meeting, or as they shall be called to meet at by the President General, on any emergency, he having first obtained in writing the consent of seven of the Members to such call, and sent due and timely notice to the whole.

That the Grand Council have power to chuse their speaker, and shall neither be dissolved prorogued, nor continue sitting longer than six weeks at one time without their own consent, or the special command of the Crown.

That the Members of the Grand Council shall be allowed for their service ten shillings sterling per diem, during their Sessions or [and] Journey to and from the place of Meeting; twenty miles to be reckoned a days Journey.

That the Assent of the President General be requisite to all Acts of the Grand Council, and that it be his Office and duty to cause them to be carried into execution.

That the President General with the advice of the Grand Council, or direct all Indian Treaties in which the general interest of the Colonies may be concerned; and make peace or declare War with Indian Nations. That they make such Laws as they judge necessary for the regulating Indian Trade. That they make all purchases from Indians for the Crown, of lands not [now] within the bounds of particular Colonies that shall not be within their bounds when some of them are reduced to more convenient dimensions. That they make new settlements on such purchases by granting Lands, [in the King's name] reserving a Quit Rent to the Crown, for the use of the General Treasury.

That they make Laws for regulating & governing such new settlements till the Crown shall think fit to form them into particular Governments.

That they raise and pay Soldiers, and build Forts for the defence of any of the Colonies, and equip vessels of Force to guard the Coasts; protect the Trade on the Ocean, Lakes, or great Rivers; but they shall not impress men in any Colonies without the consent of its Legislature. That for these purposes they have power to make Laws and lay and Levie such general duties, imposts or taxes, as to them shall appear most equal and just, considering the ability and other circumstances of the Inhabitants in the several Colonies, and such as may be collected with the least inconvenience to the people, rather discouraging luxury, than loading Industry with unnecessary burthens.—That they might appoint a General Treasurer and a particular Treasurer in each Government when necessary, and from time to time may order the sums in the Treasuries of each Government, into the General Treasury, or draw on them for special payments as they find most convenient; yet no money to issue but by joint orders of the President General and Grand Council, except where sums have been appropriated to particular purposes, and the President General is previously empowered by an Act to draw for such sums.

That the General accounts shall be yearly settled and reported to the several Assemblies.

That a Quorum of the Grand Council empowered to act with the President General, do consist of twenty five Members, among whom there shall be one or more from a majority of the Colonies. That the laws made by them for the purposes aforesaid, shall not be repugnant, but as near as may be agreeable to the Laws of England, and shall be transmitted to the King in Council for approbation, as soon as may be after their passing, and if not disapproved within three years after presentation to remain in Force.

That in case of the death of the President General, the Speaker of the Grand Council for the time being shall succeed, and be vested with the



same powers and authority, to continue until the King's pleasure be known.

That all Military Commission Officers, whether for land or sea service, to act under this General constitution, shall be nominated by the President General, but the approbation of the Grand Council is to be obtained before they receive their Commissions; and all Civil Officers are to be nominated by the Grand Council, and to receive the President General's approbation before they officiate; but in case of vacancy by death or removal of any Officer Civil or Military under this constitution, The Governor of the Province in which such vacancy happens, may appoint till the pleasure of the President General and Grand Council can be known.— That the particular Military as well as Civil establishments in each Colony remain in their present State this General constitution notwithstanding. And that on sudden emergencies any Colony may defend itself, and lay the accounts of expence thence arisen, before the President General and Grand Council, who may allow and order payment of the same as far as they judge such accounts just and reasonable.

### c. Resolutions of the Stamp Act Congress, 1765

[MacDonald, *Documentary Source Book of American History*, 1606–1926 (The Macmillan Company), pp. 137–139.]

The members of this Congress, sincerely devoted, with the warmest sentiments of affection and duty to his Majesty's person and government, inviolably attached to the present happy establishment of the Protestant succession, and with minds deeply impressed by a sense of the present and impending misfortunes of the British colonies on this continent; having considered as maturely as time will permit, the circumstances of the said colonies, esteem it our indispensable duty to make the following declarations of our humble opinion, respecting the most essential rights and liberties of the colonists, and of the grievances under which they labour, by reason of several late acts of parliament.

I. That his Majesty's subjects in these colonies, owe the same allegiance to the crown of Great Britain, that is owing from his subjects born within the realm, and all due subordination to that august body the parliament of Great-Britain.

II. That his Majesty's liege subjects in these colonies, are intitled to all the inherent rights and liberties of his natural born subjects, within the kingdom of Great-Britain.

III. That it is inseparably essential to the freedom of a people, and the undoubted right of Englishmen, that no Taxes be imposed on them but with their own consent, given personally, or by their representatives.

IV. That the people of these colonies are not, and, from the local circumstances, cannot be, represented in the House of Commons in Great-Britain.

V. That the only representatives of the people of these colonies are persons chosen therein by themselves, and that no taxes ever have been, or can be constitutionally imposed on them, but by their respective legislatures.

VI. That all supplies to the crown being free gifts of the people, it is unreasonable and inconsistent with the principles and spirit of the British constitution, for the people of Great-Britain to grant to his Majesty the property of the colonists.

VII. That trial by jury, is the inherent and invaluable right of every British subject in these colonies.

VIII. That . . . [the Stamp Act] . . . , by imposing taxes on the inhabitants of these colonies, and the said act, and several other acts, by extending the jurisdiction of the courts of admiralty beyond its ancient limits, have a manifest tendency to subvert the rights and liberties of the colonists.

IX. That the duties imposed by several late acts of parliament from the peculiar circumstances of these colonies, will be extremely burdensome and grievous; and from the scarcity of specie, the payment of them absolutely impracticable.

X. That as the profits of the trade of these colonies ultimately enter in Great-Britain, to pay for the manufactures which they are obliged to take from thence, they eventually contribute very largely to all supplies granted there to the crown.

XI. That the restrictions imposed by several late acts of parliament on the trade of these colonies, will render them unable to purchase the manufactures of Great-Britain.

XII. That the increase, prosperity and happiness of these colonies, depend on the full and free enjoyments of their rights and liberties and an intercourse with Great-Britain mutually affectionate and advantageous.

XIII. That it is the right of the British subjects in these colonies to petition the king, or either house of parliament. Lastly, that it is the indispensable duty of these colonies, to the best of sovereigns, to the mother country, and to themselves, to endeavour by a loyal and dutiful address to his Majesty, and humble applications to both houses of parliament, to procure the repeal of the act for granting and approving certain stamp duties, of all clauses of any other acts of parliament, whereby the jurisdiction of the admiralty is extended as aforesaid and of the other late acts for the restriction of American commerce.

### 3. COMMITTEES OF CORRESPONDENCE

During the early revolutionary period (1772-1775), when the regularly constituted authorities were for the most part still controlled by the British, it became necessary for the revolutionists to establish some means of communication in order to keep informed on matters of common concern and to agree on common action with respect to those matters. Soon there grew up a complete network of such committees, both local and colonial in their scope, that through their correspondence with one another not only served as channels of communication and information, but also became in fact the means of carrying on a government that functioned quite as actively as that in the hands of the British.

#### a. Origin of Committees of Correspondence

[*Writings of Thomas Jefferson* (Ford ed., published by G. P. Putnam's Sons), vol. I, pp. 7-9.]



Dummore) dissolved us, but the commee met the next day, prepared a circular letter to the Speakers of the other colonies, inclosing to each a copy of the resols and left it in charge with their chairman to forward them by expresses.

The origination of these commees of correspondence between the colonies has been since claimed for Massachusetts, and Marshall II. 151, has given into this error, altho' the very note of his appendix to which he refers, shows that their establmt was confined to their own towns. This matter will be seen clearly stated in a letter of Samuel Adams Wells to me of Apr. 2., 1819, and my answer of May 12. I was corrected by the letter of Mr. Wells in the information I had given Mr. Wirt, as stated in his note, pa. 87, that the messengers of Massach. & Virga crossed each other on the way bearing similar propositions, for Mr. Wells shows that Mass. did not adopt the measure but on the receipt of our proposn delivered at their next session. Their message therefore which passed ours, must have related to something else, for I well remember P. Randolph's informing me of the crossing of our messengers.

#### **b. Structure of Committees of Correspondence**

[*Report, American Historical Association, 1901, vol. I, p. 257.*]

The system at this point [1774] reached a well-nigh perfect adjustment. The elasticity of its operation in New Jersey makes that colony a model for its exposition. The inhabitants of each township elected a township committee of correspondence for the special purpose of corresponding with other township committees within the county. It could, however, extend its correspondence when necessary. The county committee was formed by the township committees from members chosen of their own number. This county committee would then correspond with the other county committees in the province, and when deemed necessary could call a county meeting or convention. It reacted through the township committees on the individual inhabitants. The county committees chose in turn certain of their own number to form a provincial committee of correspondence. The especial function of this body was to correspond with the other colonies and call a provincial congress for New Jersey when necessary. It reacted on its own colony through the medium of the county and township committees. The superiority of the provincial committee of correspondence over the assembly committees is obvious. It was always in session as a standing committee, and by referendum could at any time test the wishes of the people, since the town and county branches of the organization kept

constantly in touch with them. The provincial congress on August 12, 1775, defined the qualifications of electors and the powers and functions of the different grades of committees. Thus perfected, the system was a rapidly working and highly efficient piece of administrative machinery. Connected with the popular cause through representation in Congress, the action of the system was equally facile toward the central government at one end of the chain of committees and toward the individual at the other, the county committees being responsible for the execution of the resolutions and orders of the continental and provincial congresses.

### c. Functions of the Committees of Correspondence

[*Minutes of the Albany Committee of Correspondence*, vol. I, pp. v-vi.]

One is . . . impressed with the orderly and legal way in which the Revolution was carried on. At the beginning the committee seemingly merely regarded itself as a military committee to assist in raising the supporting troops. It was very particular not to interfere at first with the civil and judicial functions of government. It was only later, when the officials in charge of such matters either fled or failed to perform their duties, that the committee felt called upon to intervene, and then only generally to the extent of seeing that other officials were properly chosen.

No committee of revolutionaries showed a more careful regard for the fact that they owed their powers to the people who elected them and no suggestion is even found that the members should continue in power beyond the time for which they were chosen.

Everything pertaining to the successful prosecution of the war they felt to be within their province. It is an almost bewildering array of activities. (1) The raising, drafting, equipping, disciplining, training, officering, stationing and paying of troops. (2) The exemptions from military duty of those in essential industries or employment. (3) The detection, imprisonment, punishment and exile of the disaffected, spies and emissaries. (4) The suppression of organized revolts within the county and the prosecution of those guilty of speaking adversely of the patriot cause. (5) The support of those made poor by the war, the burial of their dead, and the helping of refugees. (6) The collection of the excise and the regulation of taverns. (7) The supervision of the construction of hospitals, barracks, forts and prisons. (8) The assumption of authority over the ordinances and powers of the city officers and the control of firemasters and fire regulations. (9) The regulation of prices for all kinds of articles, particularly of tea, sugar and salt.

(10) The regulation and encouragement of trade and manufactures, and the inspection for bad products. (11) The handling of appeals to control housing difficulties, fix wages and prevent hoarding. (12) The encouragement of auxiliary aid such as the knitting of socks for the soldiers, collecting linen rags, medicines, and instruments. (13) The control of the issuance of paper money and of counterfeiting. (14) The quarantining against smallpox. (15) The rationing of food, particularly of wheat, and preventing its distillation into whiskey. (16) Subscriptions for the poor at home and in Boston. (17) The supervision of elections of members in subdistricts and for members of the Provincial Congress and the Legislature. (18) The maintenance of law and order. (19) The establishment of night watches. (20) The management of Indian affairs and relations.

A large part of the time of the committee was taken up, as might be expected, with the tories, prisoners, deserters, murders, passes, rangers, protection of the loyal, robberies, plunder, sequestration of tory property and treason, all very similar in character to the work carried on by the commissioners for detecting conspiracies. The patience exhibited in this work is at times surprising and if cruel treatment in the prisons is sometimes alleged, it must be attributed to lack of facilities rather than to intent.

#### 4. THE CONTINENTAL CONGRESSES

At the suggestion of the Massachusetts House of Representatives, delegates chosen from the several colonies (all except Georgia being represented) met at Philadelphia in September, 1774, for the purpose of deliberating and determining upon measures to be taken for the restoration of harmony between Great Britain and the colonies. This first Continental Congress, as it was called, adopted an impressive declaration of rights, and, in an effort to force redress of their grievances, agreed further upon a boycott of British trade, the delegates organizing themselves into a so-called "Continental Association" for the purpose of enforcing such boycott. A second Continental Congress was called to carry on these measures of petition and protest, but when it met in May, 1775, hostilities had begun, and there being no other agency to act for the colonies, this Congress therefore assumed the functions of a central governing body, acting as such until the ratification of the Articles of Confederation in 1781.

##### a. Declaration and Resolves of the First Continental Congress

*[Journals of the Continental Congress, vol. I, pp. 63-73.]*

Whereas, since the close of the last war, the British parliament, claiming a power, of right, to bind the people of America by statutes

in all cases whatsoever, hath, in some acts, expressly imposed taxes on them, and in others, under various pretences, but in fact for the purpose of raising a revenue, hath imposed rates and duties payable in these colonies, established a board of commissioners, with unconstitutional powers, and extended the jurisdiction of courts of admiralty, not only for collecting the said duties, but for the trial of causes merely arising within the body of a county.

And whereas, in consequence of other statutes, judges, who before held only estates at will in their offices, have been made dependant on the crown alone for their salaries, and standing armies kept in times of peace: And whereas it has lately been resolved in parliament, that by force of a statute, made in the thirty-fifth year of the reign of King Henry the Eighth, colonists may be transported to England, and tried there upon accusations for treasons and misprisions, or concealments of treasons committed in the colonies, and by a late statute, such trials have been directed in cases therein mentioned:

And whereas, in the last session of parliament, three statutes were made . . . [the Boston Port Act, the Massachusetts Government Act, and the Administration of Justice Act;] . . . and another statute was then made . . . [the Quebec Act] . . . All which statutes are impolitic, unjust, and cruel, as well as unconstitutional, and most dangerous and destructive of American rights:

And whereas, assemblies have been frequently dissolved, contrary to the rights of the people, when they attempted to deliberate on grievances; and their dutiful, humble, loyal, and reasonable petitions to the crown for redress, have been repeatedly treated with contempt, by his Majesty's ministers of state:

The good people of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Newcastle, Kent, and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, justly alarmed at these arbitrary proceedings of parliament and administration, have severally elected, constituted, and appointed deputies to meet, and sit in general Congress, in the city of Philadelphia, in order to obtain such establishment, as that their religion, laws, and liberties, may not be subverted: Whereupon the deputies so appointed being now assembled, in a full and free representation of these colonies, taking into their most serious consideration, the best means of attaining the ends aforesaid, do, in the first place, as Englishmen, their ancestors in like cases have usually done, for asserting and vindicating their rights and liberties, DECLARE,

That the inhabitants of the English colonies in North-America, by the immutable laws of nature, the principles of the English constitution, and the several charters or compacts, have the following RIGHTS:

*Resolved, N.C.D.* 1. That they are entitled to life, liberty and property: and they have never ceded to any foreign power whatever, a right to dispose of either without their consent.

*Resolved, N.C.D.* 2. That our ancestors, who first settled these colonies, were at the time of their emigration from the mother country, entitled to all the rights, liberties, and immunities of free and natural-born subjects, within the realm of England.

*Resolved, N.C.D.* 3. That by such emigration they by no means forfeited, surrendered, or lost any of those rights, but that they were, and their descendants now are, entitled to the exercise and enjoyment of all such of them, as their local and other circumstances enable them to exercise and enjoy.

*Resolved,* 4. That the foundation of English liberty, and of all free government, is a right in the people to participate in their legislative council: and as the English colonists are not represented, and from their local and other circumstances, cannot properly be represented in the British parliament, they are entitled to a free and exclusive power of legislation in their several provincial legislatures, where their right of representation can alone be preserved, in all cases of taxation and internal polity, subject only to the negative of their sovereign, in such manner as has been heretofore used and accustomed: But, from the necessity of the case, and a regard to the mutual interest of both countries, we cheerfully consent to the operation of such acts of the British parliament, as are bona fide, restrained to the regulation of our external commerce, for the purpose of securing the commercial advantages of the whole empire to the mother country, and the commercial benefits of its respective members; excluding every idea of taxation internal or external, for raising a revenue on the subjects, in America, without their consent.

*Resolved, N.C.D.* 5. That the respective colonies are entitled to the common law of England, and more especially to the great and inestimable privilege of being tried by their peers of the vicinage, according to the course of that law.

*Resolved,* 6. That they are entitled to the benefit of such of the English statutes, as existed at the time of their colonization; and which they have, by experience, respectively found to be applicable to their several local and other circumstances.

*Resolved, N.C.D.* 7. That these, his majesty's colonies, are likewise entitled to all the immunities and privileges granted and confirmed to

them by royal charters, or secured by their several codes of provincial laws.

*Resolved, N.C.D.* 8. That they have a right peaceably to assemble, consider of their grievances, and petition the king; and that all prosecutions, prohibitory proclamations, and commitments for the same, are illegal.

*Resolved, N.C.D.* 9. That the keeping a standing army in these colonies, in times of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

*Resolved, N.C.D.* 10. It is indispensably necessary to good government, and rendered essential by the English constitution, that the constituent branches of the legislature be independent of each other; that, therefore, the exercise of legislative power in several colonies, by a council appointed, during pleasure, by the crown, is unconstitutional, dangerous and destructive to the freedom of American legislation.

All and each of which the aforesaid deputies, in behalf of themselves, and their constituents, do claim, demand, and insist on, as their indubitable rights and liberties; which cannot be legally taken from them, altered or abridged by any power whatever, without their own consent, by their representatives in their several provincial legislatures.

In the course of our inquiry, we find many infringements and violations of the foregoing rights, which, from an ardent desire, that harmony and mutual intercourse of affection and interest may be restored, we pass over for the present, and proceed to state such acts and measures as have been adopted since the last war, which demonstrate a system formed to enslave America.

*Resolved, N.C.D.* That the following acts of parliament are infringements and violations of the rights of the colonists; and that the repeal of them is essentially necessary, in order to restore harmony between Great-Britain and the American colonies, viz. . . . [The Stamp Act, the Townshend Revenue Act, the coercive acts of 1774, the Quebec Act, &c.]. . . .

Also, that the keeping a standing army in several of these colonies, in time of peace, without the consent of the legislature of that colony, in which such army is kept, is against law.

. . . . .

## b. The Continental Association

[*Journals of the Continental Congress*, vol. I, pp. 75-80.]

WE, his majesty's most loyal subjects, the delegates of the several colonies of New-Hampshire, Massachusetts-Bay, Rhode-Island, Connecticut, New-York, New-Jersey, Pennsylvania, the three lower counties



of Newcastle, Kent and Sussex on Delaware, Maryland, Virginia, North-Carolina, and South-Carolina, deputed to represent them in a continental Congress, held in the city of Philadelphia, on the fifth day of September, 1774, avowing our allegiance to his majesty, our affection and regard for our fellow-subjects in Great Britain and elsewhere, affected with the deepest anxiety, and most alarming apprehensions, at those grievances and distresses, with which his majesty's American subjects are oppressed; and having taken under our most serious deliberation, the state of the whole continent, find, that the present unhappy situation of our affairs is occasioned by a ruinous system of colony administration, adopted by the British ministry about the year 1763, evidently calculated for enslaving these colonies, and, with them, the British Empire. In prosecution of which system, various acts of parliament have been passed, for raising a revenue in America, for depriving the American subjects, in many instances, of the constitutional trial by jury, exposing their lives to danger by directing a new and illegal trial beyond the seas, for crimes alleged to have been committed in America: And in prosecution of the same system, several late, cruel, and oppressive acts have been passed, respecting the town of Boston and the Massachusetts-Bay, and also an act for extending the province of Quebec, so as to border on the western frontier of these colonies, establishing an arbitrary government therein, and discouraging the settlement of British subjects in that wide extended country; thus, by the influence of civil principles and ancient prejudices, to dispose the inhabitants to act with hostility against the free Protestant colonies, whenever a wicked ministry shall chuse so to direct them.

To obtain redress of these grievances, which threaten destruction to the lives, liberty, and property of his majesty's subjects, in North-America, we are of opinion, that a non-importation, non-consumption, and non-exportation agreement, faithfully adhered to, will prove the most speedy, effectual, and peaceable measure: And, therefore, we do, for ourselves and the inhabitants of the several colonies, whom we represent, firmly agree and associate, under the sacred ties of virtue, honour and love to our country, as follows:

1. That from and after the first day of December next, we will not import, into British America, from Great-Britain or Ireland, any good wares, or merchandize whatsoever, or from any other place, any such goods, wares, or merchandize, as shall have been exported from Great-Britain or Ireland; nor will we, after that day, import any East-India tea from any part of the world; nor any molasses, syrups, paneles, coffee, or pimento, from the British plantations or from Dominica; nor wine from Madeira, or the Western Islands; nor foreign indigo.

2. We will neither import nor purchase, any slave imported after the first day of December next ; after which time, we will wholly discontinue the slave trade, and will neither be concerned in it ourselves, nor will we hire our vessels, nor sell our commodities or manufactures to those who are concerned in it.

3. As a non-consumption agreement, strictly adhered to, will be an effectual security for the observation of the non-importation, we, as above, solemnly agree and associate, that from this day, we will not purchase or use any tea, imported on account of the East-India company, or any on which a duty hath been or shall be paid ; and from and after the first day of March next, we will not purchase or use any East-India tea whatever ; nor will we, nor shall any person for or under us, purchase or use any of those goods, wares, or merchandize, we have agreed not to import, which we shall know, or have cause to suspect, were imported after the first day of December, except such as come under the rules and directions of the tenth article hereafter mentioned.

4. The earnest desire we have not to injure our fellow-subjects in Great-Britain, Ireland, or the West-Indies, induces us to suspend a non-exportation, until the tenth day of September, 1775 ; at which time, if the said acts and parts of acts of the British parliament herein after mentioned, are not repealed, we will not directly or indirectly, export any merchandize or commodity whatsoever to Great-Britain, Ireland, or the West-Indies, except rice to Europe.

5. Such as are merchants, and use the British and Irish trade, will give orders, as soon as possible, to their factors, agents and correspondents, in Great-Britain and Ireland, not to ship any goods to them, on any pretence whatsoever, as they cannot be received in America ; and if any merchant, residing in Great-Britain or Ireland, shall directly or indirectly ship any goods, wares, or merchandize, for America, in order to break the said non-importation agreement, or in any manner contravene the same, on such unworthy conduct being well attested, it ought to be made public ; and, on the same being so done, we will not, from thenceforth, have any commercial connexion with such merchant.

6. That such as are owners of vessels will give positive orders to their captains, or masters, not to receive on board their vessels any goods prohibited by the said non-importation agreement, on pain of immediate dismission from their service.

7. We will use our utmost endeavours to improve the breed of sheep, and increase their number to the greatest extent ; and to that end, we will kill them as seldom as may be, especially those of the most profitable kind ; nor will we export any to the West-Indies or elsewhere ; and those

of us, who are or may become overstocked with, or can conveniently spare any sheep, will dispose of them to our neighbours, especially to the poorer sort, on moderate terms.

8. We will, in our several stations, encourage frugality, oeconomy, and industry, and promote agriculture, arts and the manufactures of this country, especially that of wool; and will discountenance and discourage every species of extravagance and dissipation, especially all horse-racing and all kinds of gaming, cock fighting, exhibitions of shews, plays, and other expensive diversions and entertainments; and on the death of any relation or friend, none of us, or any of our families will go into any further mourning-dress, than a black crape or ribbon on the arm or hat for gentlemen, and a black ribbon and necklace for ladies, and we will discontinue the giving of gloves and scarves at funerals.

9. Such as are venders of goods or merchandize will not take advantage of the scarcity of goods, that may be occasioned by this association but will sell the same at the rates we have been respectively accustomed to do, for twelve months last past.—And if any vender of goods or merchandize shall sell such goods on higher terms, or shall, in any manner, or by any device whatsoever, violate or depart from this agreement no person ought, nor will any of us deal with any such person, or his or her factor or agent, at any time thereafter, for any commodity whatever.

10. In case any merchant, trader, or other person, shall import any goods or merchandize, after the first day of December, and before the first day of February next, the same ought forthwith, at the election of the owner, to be either re-shipped or delivered up to the committee of the country or town, wherein they shall be imported, to be stored at the risk of the importer, until the non-importation agreement shall cease, or to be sold under the direction of the committee aforesaid; and in the last-mentioned case, the owner or owners of such goods shall be reimbursed out of the sales, the first cost and charges, the profit, if any, to be applied towards relieving and employing such poor inhabitants of the town of Boston, as are immediate sufferers by the Boston port-bill; and a particular account of all goods so returned, stored, or sold, to be inserted in the public papers; and if any goods or merchandizes shall be imported after the said first day of February, the same ought forthwith to be sent back again, without breaking any of the packages thereof.

11. That a committee be chosen in every county, city, and town, by those who are qualified to vote for representatives in the legislature, whose business it shall be attentively to observe the conduct of all persons touching this association; and when it shall be made to appear, to the satisfaction of a majority of any such committee, that any person

within the limits of their appointment has violated this association, that such majority do forthwith cause the truth of the case to be published in the gazette; to the end, that all such foes to the rights of British-America may be publicly known, and universally condemned as the enemies of American liberty; and thenceforth we respectively will break off all dealings with him or her.

12. That the committee of correspondence, in the respective colonies, do frequently inspect the entries of their custom-houses, and inform each other, from time to time, of the true state thereof, and of every other material circumstance that may occur relative to this association.

13. That all manufactures of this country be sold at reasonable prices, so that no undue advantage be taken of a future scarcity of goods.

14. And we do further agree and resolve, that we will have no trade, commerce, dealings or intercourse whatsoever, with any colony or province, in North-America, which shall not accede to, or which shall hereafter violate this association, but will hold them as unworthy of the rights of freemen, and as inimical to the liberties of their country.

[This association to be adhered to until the acts complained of are repealed.]

## 5. DECLARATION OF INDEPENDENCE

For some time after the actual outbreak of hostilities, there were many of the influential revolutionary leaders who still hoped for reconciliation with England, and as a final effort in that direction the Second Continental Congress, on July 8, 1775, adopted another petition to the King, setting forth the grievances of the colonies in a conciliatory manner and asking for redress. However, on August 23, the very day on which the petition was to be presented, the King issued his proclamation of rebellion against the colonies, and later refused an audience to the colonial representatives. All hopes of reconciliation being thus abandoned, Richard Henry Lee of Virginia, on June 7, 1776, moved several resolutions, the first declaring "That these United Colonies are, and of right ought to be, free and independent States, that they are absolved from all allegiance to the British Crown, and that all political connection between them and the State of Great Britain is, and ought to be, totally dissolved." This resolution was, on June 10, referred to a committee consisting of Thomas Jefferson, John Adams, Benjamin Franklin, Roger Sherman, and Robert R. Livingstone, which committee reported on June 28 the draft of a declaration written almost entirely by Jefferson. Lee's resolution was debated vigorously in Congress, with the more moderate revolutionists, led by John Dickinson, arguing for further delay. It was finally adopted on July 2, and on July 4 the formal declaration, with some slight changes from Jefferson's draft, was likewise adopted, and signed by John Hancock as president of the Continental Congress, the other members attaching their signatures later.

*In Congress, July 4, 1776,*

THE UNANIMOUS DECLARATION OF THE THIRTEEN  
UNITED STATES OF AMERICA,

When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the Powers of the earth, the separate and equal station to which the Laws of Nature and of Nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed, That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness. Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly a experience hath shown, that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.—Such has been the patient sufferance of these Colonies; and such is now the necessity which constrains them to alter their former System of Government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute Tyranny over these States. To prove this, let Facts be submitted to a candid world.

He has refused his Assent to Laws, the most wholesome and necessary for the public good.

He has forbidden his Governors to pass Laws of immediate and pressing importance, unless suspended in their operation till his Assent should be obtained; and when so suspended, he has utterly neglected to attend to them.

He has refused to pass other Laws for the accommodation of large districts of people, unless those people would relinquish the right of



Representation in the Legislature, a right inestimable to them and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the despository of their Public Records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved Representative Houses repeatedly, for opposing with manly firmness his invasions on the rights of the people.

He has refused for a long time, after such dissolutions, to cause others to be elected; whereby the Legislative Powers, incapable of Annihilation, have returned to the People at large for their exercise; the State remaining in the mean time exposed to all the dangers of invasion from without, and convulsions within.

He has endeavoured to prevent the population of these States; for that purpose obstructing the Laws of Naturalization of Foreigners; refusing to pass others to encourage their migration hither, and raising the conditions of new Appropriations of Lands.

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the tenure of their offices, and the amount and payment of their salaries.

He has erected a multitude of New Offices, and sent hither swarms of Officers to harass our People, and eat out their substance.

He has kept among us, in times of peace, Standing Armies without the Consent of our legislature.

He has affected to render the Military independent of and superior to the Civil Power.

He has combined with others to subject us to a jurisdiction foreign to our constitution, and unacknowledged by our laws giving his Assent to their acts of pretended legislation:

For quartering large bodies of armed troops among us:

For protecting them, by a mock Trial, from Punishment for any Murders which they should commit on the Inhabitants of these States:

For cutting off our Trade with all parts of the world:

For imposing taxes on us without our Consent:

For depriving us in many cases, of the benefits of Trial by jury:

For transporting us beyond Seas to be tried for pretended offences:

For abolishing the free System of English Laws in a neighboring Province, establishing therein an Arbitrary government, and enlarging its Boundaries so as to render it at once an example and fit instrument for introducing the same absolute rule into these Colonies:

For taking away our Charters, abolishing our most valuable Laws, and altering fundamentally the Forms of our Governments:



For suspending our own Legislature, and declaring themselves irrevocably vested with Power to legislate for us in all cases whatsoever.

He has abdicated Government here, by declaring us out of his Protection and waging War against us.

He has plundered our seas, ravaged our Coasts, burnt our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation and tyranny, already begun with circumstances of Cruelty & perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the Head of a civilized nation.

He has constrained our fellow Citizens taken Captive on the high Seas to bear Arms against their Country, to become the executioners of their friends and Brethren, or to fall themselves by their Hands.

He has excited domestic insurrections amongst us, and has endeavored to bring on the inhabitants of our frontiers, the merciless Indian Savages, whose known rule of warfare, is an undistinguished destruction of all ages, sexes and conditions.

In every stage of these Oppressions We have Petitioned for Redress in the most humble terms: Our repeated Petitions have been answered only by repeated injury. A Prince, whose character is thus marked by every act which may define a Tyrant, is unfit to be the ruler of a free People.

Nor have We been wanting in attention to our British brethren. We have warned them from time to time of attempts by their legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them by the ties of our common kindred to disavow these usurpations which, would inevitably interrupt our connections and correspondence. They too have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity, which denounces our Separation, and hold them, as we hold the rest of mankind, Enemies in War, in Peace Friends.

We, therefore, the Representatives of the united States of America in General Congress, Assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the Name, and by Authority of the good People of these Colonies, solemnly publish and declare, That these United Colonies are, and of Right ought to be Free and Independent States; that they are Absolved from all Allegiance to the British Crown, and that all political connection between them and the State of Great Britain, is and ought to be totally dissolved; and

that as Free and Independent States, they have full Power to levy War, conclude Peace, contract Alliances, establish Commerce, and to do all other Acts and Things which Independent States may of right do. And for the support of this Declaration, with a firm reliance on the Protection of Divine Providence, we mutually pledge to each other our Lives, our Fortunes and our sacred Honor.

JOHN HANCOCK.<sup>1</sup>

## 6. ARTICLES OF CONFEDERATION

Shortly after the Second Continental Congress met in 1775, Franklin proposed a plan of union similar to his earlier Albany Plan. Nothing was done, however, until Richard Henry Lee, at the same time that he proposed his famous resolution for independence, offered another to form a confederation. This was adopted by the Continental Congress on June 11, 1776, and a committee was appointed on the following day to prepare a plan. John Dickinson, as chairman of this committee, drafted a plan which was reported to Congress on July 12, 1776, debated at intervals, and finally adopted with some amendments on November 15, 1777. Although it was agreed that the plan should be submitted to the state legislatures for their approval, this was not done until several months later. Most of the states ratified promptly, but Maryland withheld its approval until agreement was reached on the conflicting claims to the Western lands. With the cession or promise of cession of these lands to the United States, Maryland ratified on March 1, 1781, and the Articles became effective the following day.

[*Journals of the Continental Congress*, vol. XIX, pp. 214-222.]

*Articles of Confederation and perpetual Union between the States of Newhamshire, Massachusetts-bay, Rhodeisland and Providence Plantations, Connecticut, New-York, New-Jersey, Pennsylvania, Delaware, Maryland, Virginia, North-Carolina, South-Carolina and Georgia.*

ARTICLE I. The stile of this confederacy shall be "The United States of America."

ARTICLE II. Each State retains its sovereignty, freedom and independence, and every power, jurisdiction and right, which is not by this confederation expressly delegated to the United States, in Congress assembled.

ARTICLE III. The said States hereby severally enter into a firm league of friendship with each other, for their common defence, the security of their liberties, and their mutual and general welfare, binding themselves to assist each other, against all force offered to, or attacks made upon them, or any of them, on account of religion, sovereignty, trade, or any other pretence whatever.

<sup>1</sup> The remaining signatures are omitted.

ARTICLE IV. The better to secure and perpetuate mutual friendship and intercourse among the people of the different States in this Union, the free inhabitants of each of these States, paupers, vagabonds and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and regress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively, provided that such restrictions shall not extend so far as to prevent the removal of property imported into any State, to any other state of which the owner is an inhabitant; provided also that no imposition, duties, or restriction shall be laid by any State, on the property of the United States, or either of them.

If any Person guilty of, or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall upon demand of the Governor or Executive power, of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offence.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

ARTICLE V. For the more convenient management of the general interest of the United States, delegates shall be annually appointed in such manner as the legislature of each State shall direct, to meet in Congress on the first Monday in November, in every year, with a power reserved to each State, to recall its delegates, or any of them, at any time within the year, and to send others in their stead, for the remainder of the year.

No State shall be represented in Congress by less than two, nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of six years; nor shall any person, being a delegate, be capable of holding any office under the United States, for which he, or another for his benefit receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court, or place out of Congress, and the members of Congress shall be protected in their persons from arrests and imprison-

ments, during the time of their going to and from, and attendance on Congress, except for treason, felony, or breach of the peace.

ARTICLE VI. No State without the consent of the United States in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance or treaty with any king, prince or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office or title of any kind whatever from any king, prince, or foreign state; nor shall the United States in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation or alliance whatever between them, without the consent of the United States in Congress assembled, specifying accurately the purposes for which the same is to be entered into, and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties, entered into by the United States in Congress assembled, with any king, prince or state, in pursuance of any treaties already proposed by Congress, to the courts of France and Spain.

No vessels of war shall be kept up in time of peace by any State, except such number only, as shall be deemed necessary by the United States in Congress assembled, for the defence of such State, or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only, as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defence of such State; but every State shall always keep up a well regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and constantly have ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition and camp equipage.

No State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay, till the United States in Congress assembled can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States in Congress assembled, and then only against the kingdom or state and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States in Congress assembled, unless such State be infested by pirates, in which case vessels

of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States in Congress assembled shall determine otherwise.

ARTICLE VII. When land-forces are raised by any State for the common defence, all officers of or under the rank of colonel, shall be appointed by the Legislature of each State respectively by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

ARTICLE VIII. All charges of war, and all other expenses that shall be incurred for the common defence or general welfare, and allowed by the United States in Congress assembled, shall be defrayed out of a common treasury, which shall be supplied by the several States, in proportion to the value of all land within each State, granted to or surveyed for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States in Congress assembled, shall from time to time direct and appoint.

The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States in Congress assembled.

ARTICLE IX. The United States in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article—of sending and receiving ambassadors—entering into treaties and alliances, provided that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners, as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever—of establishing rules for deciding in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated—of granting letters of marque and reprisal in times of peace—appointing courts for the trial of piracies and felonies committed on the high seas and establishing courts for receiving and determining finally appeals in all cases of captures, provided that no member of Congress shall be appointed a judge of any of the said courts.

The United States in Congress assembled shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise between two or more States concerning boundary, jurisdiction or any other cause whatever; which authority shall always be exercised in the manner following. Whenever the legislative or executive au-

thority or lawful agent of any State in controversy with another shall present a petition to Congress, stating the matter in question and praying for a hearing, notice thereof shall be given by order of Congress to the legislative or executive authority of the other State in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint by joint consent, commissioners, or judges to constitute a court for hearing and determining the matter in question: but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names as Congress shall direct, shall in the presence of Congress be drawn out by lot, and the persons whose names shall be so drawn or any five of them, shall be commissioners or judges, to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons, which Congress shall judge sufficient, or being present shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall nevertheless proceed to pronounce sentence, or judgment, which shall in like manner be final and decisive, the judgment or sentence and other proceedings being in either case transmitted to Congress, and lodged among the acts of Congress for the security of the parties concerned: provided that every commissioner, before he sits in judgment, shall take an oath to be administered by one of the judges of the supreme or superior court of the State, where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favour, affection or hope of reward:" provided also that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdiction as they may respect such lands, and the States which passed such grants are adjusted; the said grants or either of them being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall on the petition of either party to the Congress of the United States, be



finally determined as near as may be in the same manner as is before prescribed for deciding disputes respecting territorial jurisdiction between different States.

The United States in Congress assembled shall also have the sole and exclusive right and power of regulating the alloy and value of coins struck by their own authority, or by that of the respective States—fixing the standard of weights and measures throughout the United States—regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated—establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing thro' the same as may be requisite to defray the expenses of the said office—appointing a officers of the land forces, in the service of the United States, excepting regimental officers—appointing all the officers of the naval forces, and commissioning all officers whatever in the service of the United States—making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States in Congress assembled shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated “Committee of the States,” and to consist of one delegate from each State and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction—to appoint one of their number to preside, provided that no person be allowed to serve in the office of president more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses—to borrow money, or emit bills on the credit of the United States, transmitting every half year to the respective States an account of the sums of money so borrowed or emitted,—to build and equip a navy—to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State; which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men and cloath, arm and equip them in a soldier like manner, at the expense of the United States; and the officers and men so cloathed, armed and equipped shall march to the place appointed, and within the time agreed on by the United States in Congress assembled; but if the United States in Congress assembled shall, on consideration of circumstances judge proper that any State should not raise men, or should raise a smaller number than its quota,

and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed and equipped in the same manner as the quota of such State, unless the legislature of such State shall judge that such extra number cannot be safely spared out of the same, in which case they shall raise, officer, cloth, arm and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed and equipped, shall march to the place appointed, and within the time agreed on by the United States in Congress assembled.

The United States in Congress assembled shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defence and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war, to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander in chief of the army or navy, unless nine States assent to the same: nor shall a question on any other point, except for adjourning from day to day be determined, unless by the votes of a majority of the United States in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to place within the United States, so that no period of adjournment be for a longer duration than the space of six months, and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances or military operations, as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

ARTICLE X. The committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States in Congress assembled, by the consent of nine States, shall from time to time think expedient to vest them with; provided that no power be delegated to the said committee, for the exercise of which, by the articles of confederation, the voice of nine States in the Congress of the United States assembled is requisite.

ARTICLE XI. Canada acceding to this confederation, and joining in the measures of the United States, shall be admitted into, and entitled to

all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

ARTICLE XII. All bills of credit emitted, monies borrowed and contracted by, or under the authority of Congress, before the assembling of the United States, in pursuance of the present confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States, and the public faith are hereby solemnly pledged.

ARTICLE XIII. Every State shall abide by the determinations of the United States in Congress assembled, on all questions which by this confederation are submitted to them. And the articles of this confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them; unless such alteration be agreed to in a Congress of the United States, and be afterwards confirmed by the Legislatures of every State.

## CHAPTER II

### THE MAKING AND DEVELOPMENT OF THE CONSTITUTION

#### 7. CALL FOR CONSTITUTIONAL CONVENTION

The Articles of Confederation were early found to be defective, especially in the provisions with respect to taxation and commerce. Proposals to remedy these defects by amendment failed on account of the requirement for unanimous ratification. In view of the continuing difficulties with respect to their trade relations in particular, the states found it necessary to adjust these difficulties in some other manner. Consequently, delegates from Virginia and Maryland met at Alexandria and Mt. Vernon in 1785, and agreed upon certain matters with respect to navigation on the Potomac. Partly as a result of this conference, and at the suggestion of the Virginia Assembly, another much more important conference was held the next year at Annapolis, as a general conference of the states to consider trade and commercial relations. This Annapolis Convention, as it was called, found the problem of commercial relations to be only one of many, and proposed therefore another convention for the purpose of revising the Articles. Congress accepted this suggestion, and issued its call for such a convention to meet in Philadelphia in the following year.

##### a. Report of Annapolis Convention, 1786

*[Debates in the Federal Convention of 1787 reported by James Madison (Hunt & Scott ed., published by Carnegie Endowment for International Peace), pp. xlix-lili.]*

*To the Honorable the Legislatures of Virginia, Delaware,  
Pennsylvania, New Jersey, and New York*

The commissioners from the said states respectively, assembled at Annapolis, humbly beg leave to report,

That, pursuant to their several appointments, they met, at Annapolis in the State of Maryland, on the 11th day of September instant; and having proceeded to a Communication of their powers, they found that the States of New York, Pennsylvania, and Virginia, had, in substance, and nearly in the same terms, authorized their respective commissioners "to meet such Commissioners as were or might be appointed by the other States in the Union, at such time and place as should be agreed upon by the said Commissioners, to take into consideration the trade and Com-

merce of the United States, to consider how far an uniform system in their commercial intercourse and regulations might be necessary to their common interest and permanent harmony, and to report to the several States such an Act, relative to this great object as, when unanimously ratified by them would enable the United States in Congress assembled effectually to provide for the same."

That the State of Delaware had given similar powers to their Commissioners, with this difference only, that the Act to be framed in virtue of these powers, is required to be reported "to the United States in Congress assembled, to be agreed to by them, and confirmed by the Legislatures of every State."

That the State of New Jersey had enlarged the object of their appointment, empowering their Commissioners "to consider how far a uniform system in their commercial regulations and *other important matters* might be necessary to the common interest and permanent harmony of the several States," and to report such an Act on the subject as, when ratified by them "would enable the United States in Congress assembled effectually to provide for the exigencies of the Union."

That appointments of Commissioners have also been made by the States of New Hampshire, Massachusetts, Rhode Island, and North Carolina, none of whom however have attended; but that no information has been received by your Commissioners, of any appointment having been made by the States of Connecticut, Maryland, South Carolina or Georgia.

That the express terms of the powers to your Commissioners supposing a deputation from all the States, and having for object the Trade and Commerce of the United States, Your Commissioners did not conceive it advisable to proceed on the business of their mission, under the Circumstance of so partial and defective a representation.

Deeply impressed however with the magnitude and importance of the object confided to them on this occasion, your Commissioners cannot forbear to indulge an expression of their earnest and unanimous wish, that speedy measures may be taken, to effect a general meeting, of the States, in a future Convention, for the same, and such other purposes, as the situation of public affairs, may be found to require.

If, in expressing this wish, or in intimating any other sentiment, your Commissioners should seem to exceed the strict bounds of their appointment, they entertain a full confidence, that a conduct, dictated by an anxiety for the welfare, of the United States, will not fail to receive an indulgent construction.

In this persuasion, your Commissioners submit an opinion, that the Idea of extending the powers of their Deputies, to other objects, than

those of Commerce, which has been adopted by the State of New Jersey, was an improvement on the original plan, and will deserve to be incorporated into that of a future Convention. They are the more naturally led to this conclusion, as in the course of their reflections on the subject, they have been induced to think, that the power of regulating trade is of such comprehensive extent, and will enter so far into the general System of the federal government, that to give it efficacy, and to obviate questions and doubts concerning its precise nature and limits, may require a correspondent adjustment of other parts of the Federal System.

That there are important defects in the system of the Federal Government is acknowledged by the Acts of all those States, which have concurred in the present Meeting; That the defects, upon a closer examination, may be found greater and more numerous, than even these acts imply, is at least so far probable, from the embarrassments which characterize the present State of our national affairs, foreign and domestic, as may reasonably be supposed to merit a deliberate and candid discussion, in some mode, which will unite the Sentiments and Councils of all the States. In the choice of the mode, your Commissioners are of opinion, that a Convention of Deputies from the different States, for the special and sole purpose of entering into this investigation, and digesting a plan for supplying such defects as may be discovered to exist, will be entitled to a preference from considerations, which will occur, without being particularised.

Your Commissioners decline an enumeration of those national circumstances on which their opinion respecting the propriety of a future Convention, with more enlarged powers, is founded; as it would be a useless intrusion of facts and observations, most of which have been frequently the subject of public discussion, and none of which can have escaped the penetration of those to whom they would in this instance be addressed. They are however of a nature so serious, as, in the view of your Commissioners to render the situation of the United States delicate and critical, calling for an exertion of the united virtue and wisdom of all the members of the Confederacy.

Under this impression, Your Commissioners, with the most respectful deference, beg leave to suggest their unanimous conviction, that it may essentially tend to advance the interests of the union, if the States, by whom they have been respectively delegated, would themselves concur, and use their endeavours to procure the concurrence of the other States, in the appointment of Commissioners, to meet at Philadelphia on the second Monday in May next, to take into consideration the situation of the United States, to devise such further provisions as shall appear to them necessary to render the constitution of the Federal Government



adequate to the exigencies of the Union; and to report such an Act that purpose to the United States in Congress assembled, as when agreed to, by them, and afterwards confirmed by the Legislatures of every State, will effectually provide for the same.

Though your Commissioners could not with propriety address their observations and sentiments to any but the States they have the honor to Represent, they have nevertheless concluded from motives of respect, to transmit Copies of this Report to the United States in Congress assembled, and to the executives of the other States.

By order of the Commissioners:

Dated at Annapolis  
September 14th, 1786

### b. Call by Congress

*[Debates in the Federal Convention of 1787 reported by James Madison (Hunt & Scott ed., published by Carnegie Endowment for International Peace), pp. liv-lv.]*

Whereas there is provision, in the Articles of Confederation & Perpetual Union for making alterations therein by the assent of a Congress of the United States and of the legislatures of the several states; And whereas experience hath evinced that there are defects in the present Confederation, as a mean to remedy which several of the States are particularly the State of New York by express instructions to the delegates in Congress have suggested a convention for the purposes expressed in the following resolution and such convention appearing to be the most probable means of establishing in these states a firm national government

*Resolved* that in the opinion of Congress it is expedient that on the second Monday in May next a Convention of delegates who shall have been appointed by the several states be held at Philadelphia for the sole and express purpose of revising the Articles of Confederation and reporting to Congress and the several legislatures such alterations and provisions therein as shall when agreed to in Congress and confirmed by the states render the federal constitution adequate to the exigencies of Government & the preservation of the Union.

[Adopted Feb. 21, 1787.]

## 8. PLANS FOR A CONSTITUTION

When the Constitutional Convention met, the Virginia delegation, under the leadership of Madison, had prepared a fairly comprehensive set of principles as a

basis for a new constitution. This Virginia Plan, as it was called, was presented to the Convention by Governor Randolph on May 29. Representing the views of the large-state group and of those who favored a stronger central government, this plan aroused the opposition of the more ardent advocates of states' rights. Their ideas were consequently formulated and presented to the Convention by Paterson of New Jersey on June 15, these proposals being commonly known as the New Jersey Plan. Other systematic plans were also presented, notably by Alexander Hamilton and Charles Pinckney, but those of Randolph and Paterson formed the principal basis for discussion.

#### a. Virginia Plan

[*Journal of the Constitutional Convention of 1787* (ed. 1819), pp. 67-70.]

### RESOLUTIONS

#### OFFERED BY MR. EDMUND RANDOLPH TO THE CONVENTION, MAY 29, 1787

1. *Resolved*, That the articles of the confederation ought to be so corrected and enlarged, as to accomplish the objects proposed by their institution, namely, common defence, security of liberty, and general welfare.

2. *Resolved*, therefore, That the right of suffrage, in the national legislature, ought to be proportioned to the quotas of contribution, or to the number of free inhabitants, as the one or the other may seem best, in different cases.

3. *Resolved*, That the national legislature ought to consist of two branches.

4. *Resolved*, That the members of the first branch of the national legislature ought to be elected by the people of the several states, every  
for the term of to be of the age of  
years at least; to receive liberal stipends, by which they may be compensated for the devotion of their time to publick service; to be ineligible to any office established by a particular state, or under the authority of the United States (except those peculiarly belonging to the functions of the first branch) during the term of service and for the space of after the expiration of their term of service; and to be subject to recal.

5. *Resolved*, That the members of the second branch of the national legislature ought to be elected by those of the first, out of a proper number of persons nominated by the individual legislatures; to be of the age of years, at least; to hold their offices for a term sufficient to ensure their independency; to receive liberal stipends, by

which they may be compensated for the devotion of their time to the public service; and to be ineligible to any office established by a particular state, or under the authority of the United States, (except those peculiarly belonging to the functions of the second branch) during the term of service; and for the space of \_\_\_\_\_ after the expiration thereof.

6. *Resolved*, That each branch ought to possess the right of originating acts; that the national legislature ought to be empowered to enjoy the legislative right vested in Congress, by the confederation; and more over to legislate in all cases to which the separate states are incompetent or in which the harmony of the United States may be interrupted by the exercise of individual legislation; to negative all laws passed by the several states, contravening, in the opinion of the national legislature, the articles of union, or any treaty subsisting under the authority of the union; and to call forth the force of the union against any member of the union failing to fulfil its duty under the articles thereof.

7. *Resolved*, That a national executive be instituted, to be chosen by the national legislature for the term of \_\_\_\_\_ years, to receive punctually, at stated times, a fixed compensation for the services rendered, in which no increase or diminution shall be made, so as to affect the magistracy existing at the time of the increase or diminution; to be ineligible a second time; and that, besides a general authority to execute the national laws, it ought to enjoy the executive rights vested in Congress by the confederation.

8. *Resolved*, That the executive, and a convenient number of the national judiciary, ought to compose a council of revision, with authority to examine every act of the national legislature, before it shall operate, and every act of a particular legislature before a negative thereon shall be final; and that the dissent of the said council shall amount to a rejection, unless the act of the national legislature be again passed, or that of a particular legislature be again negatived by \_\_\_\_\_ of the members of each branch.

9. *Resolved*, That a national judiciary be established \_\_\_\_\_ to hold their offices during good behaviour, and to receive punctually, at stated times, fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution—That the jurisdiction of the inferior tribunals, shall be, to hear and determine, in the first instance, and of the supreme tribunal to hear and determine, in the dernier resort, all piracies and felonies on the high seas; captures from an enemy; cases in which foreigners, or citizens of other states,

applying to such jurisdictions, may be interested, or which respect the collection of the national revenue; impeachments of any national officer; and questions which involve the national peace or harmony.

10. *Resolved*, That provision ought to be made for the admission of states, lawfully arising within the limits of the United States, whether from a voluntary junction of government and territory, or otherwise, with the consent of a number of voices in the national legislature less than the whole.

11. *Resolved*, That a republican government, and the territory of each state (except in the instance of a voluntary junction of government and territory) ought to be guaranteed by the United States to each state.

12. *Resolved*, That provision ought to be made for the continuance of a Congress, and their authorities and privileges, until a given day, after the reform of the articles of union shall be adopted, and for the completion of all their engagements.

13. *Resolved*, That provision ought to be made for the amendment of the articles of union, whensoever it shall seem necessary; and that the assent of the national legislature ought not to be required thereto.

14. *Resolved*, That the legislative, executive, and judiciary powers within the several states ought to be bound by oath to support the articles of union.

15. *Resolved*, That the amendments, which shall be offered to the confederation by the convention, ought, at a proper time or times, after the approbation of Congress, to be submitted to an assembly or assemblies of representatives, recommended by the several legislatures, to be expressly chosen by the people to consider and decide thereon.

#### b. New Jersey Plan

[*Journal of the Constitutional Convention of 1787* (ed. 1819), pp. 123-127.]

#### PROPOSITIONS

OFFERED TO THE CONVENTION BY THE HONOURABLE  
MR. PATTERSON, JUNE 15, 1787

1. *Resolved*, That the articles of confederation ought to be so revised, corrected, and enlarged, as to render the federal constitution adequate to the exigencies of government, and the preservation of the union.

2. *Resolved*, That in addition to the powers vested in the United States in Congress, by the present existing articles of confederation, they be authorized to pass acts for raising a revenue, by levying a duty or duties on all goods and merchandize of foreign growth or manufac-

ture, imported into any part of the United States—by stamps on paper, vellum, or parchment, and by a postage on all letters and packages passing through the general post office—to be applied to such federal purposes as they shall deem proper and expedient; to make rules and regulations for the collection thereof; and the same from time to time to alter and amend, in such manner as they shall think proper. To pass acts for the regulation of trade and commerce, as well with foreign nations as with each other; provided, that all punishments, fines, forfeitures, and penalties, to be incurred for contravening such rules and regulations, shall be adjudged by the common law judiciary of the states in which any offence contrary to the true intent and meaning of such rules and regulations shall be committed or perpetrated with liberty of commencing, in the first instance, all suits or prosecutions for that purpose, in the superior common law judiciary of such state; subject, nevertheless, to an appeal for the correction of all errors, both in law and fact, in rendering judgment, to the judiciary of the United States.

3. *Resolved*, That whenever requisitions shall be necessary, instead of the present rule, the United States in Congress be authorized to make such requisitions in proportion to the whole number of white and other free citizens and inhabitants of every age, sex, and condition, including those bound to servitude for a term of years, and three fifths of all other persons not comprehended in the foregoing description, except Indians not paying taxes; that if such requisitions be not complied with in the time to be specified therein, to direct the collection thereof in the non-complying states; and for that purpose to devise and pass acts directing and authorizing the same; provided, that none of the powers hereby vested in the United States in Congress, shall be exercised without the consent of at least \_\_\_\_\_ states; and in that proportion, if the number of confederated states should be hereafter increased or diminished.

4. *Resolved*, That the United States in Congress be authorized to elect a federal executive to consist of \_\_\_\_\_ persons, to continue in office for the term of \_\_\_\_\_ years; to receive punctually, at stated times, a fixed compensation for the services by them rendered, in which no increase or diminution shall be made, so as to affect the persons composing the executive at the time of such increase or diminution; to be paid out of the federal treasury; to be incapable of holding any other office or appointment during their time of service, and for \_\_\_\_\_ years thereafter; to be ineligible a second time, and removable on impeachment and conviction for malpractices or neglect of duty, by Congress, on application by a majority of the executives of the several

states. That the executive, besides a general authority to execute the federal acts, ought to appoint all federal officers not otherwise provided for, and to direct all military operations; provided, that none of the persons composing the federal executive shall, on any occasion, take command of any troops, so as personally to conduct any military enterprise as general or in any other capacity.

5. *Resolved*, That a federal judiciary be established, to consist of a supreme tribunal, the judges of which to be appointed by the executive, and to hold their offices during good behaviour; to receive punctually, at stated times, a fixed compensation for their services, in which no increase or diminution shall be made, so as to affect the persons actually in office at the time of such increase or diminution. That the judiciary, so established, shall have authority to hear and determine, in the first instance, on all impeachments of federal officers; and by way of appeal, in the dernier resort, in all cases touching the rights and privileges of ambassadors; in all cases of captures from an enemy; in all cases of piracies and felonies on the high seas; in all cases in which foreigners may be interested, in the construction of any treaty or treaties, or which may arise on any act or ordinance of Congress for the regulation of trade, or the collection of the federal revenue. That none of the judiciary officers shall, during the time they remain in office, be capable of receiving or holding any other office or appointment during their term of service, or for                      thereafter.

6. *Resolved*, That the legislative, executive, and judiciary powers within the several states, ought to be bound, by oath, to support the articles of union.

7. *Resolved*, That all acts of the United States in Congress assembled, made by virtue and in pursuance of the powers hereby vested in them, and by the articles of the confederation, and all treaties made and ratified under the authority of the United States, shall be the supreme law of the respective states, as far as those acts or treaties shall relate to the said states, or their citizens; and that the judiciaries of the several states shall be bound thereby in their decisions, any thing in the respective laws of the individual states to the contrary notwithstanding.

And if any state, or any body of men in any state, shall oppose or prevent the carrying into execution such acts or treaties, the federal executive shall be authorised to call forth the powers of the confederated states, or so much thereof as may be necessary, to enforce and compel an obedience to such acts, or an observance of such treaties.

8. *Resolved*, That provision ought to be made for the admission of new states into the union.



9. *Resolved*, That provision ought to be made for hearing and deciding upon all disputes arising between the United States and an individual state, respecting territory.

10. *Resolved*, That the rule for naturalization ought to be the same in every state.

11. *Resolved*, That a citizen of one state, committing an offence in another state, shall be deemed guilty of the same offence as if it had been committed by a citizen of the state in which the offence was committed.

## 9. RATIFICATION OF THE CONSTITUTION

The new proposed Constitution was ratified in several states very quickly and without opposition. It was opposed very bitterly, however, in a number of states, including the important ones of Massachusetts, Virginia, and New York. The opposition was for the most part allayed by the understanding that amendments embodying a bill of rights would be promptly submitted and added to the original Constitution. In some states this was made a separate recommendation; in others, as in Massachusetts, it was made a part of the act of ratification.

### a. Massachusetts Act of Ratification

[*Elliot's Debates*, vol. II, pp. 176-178.]

## COMMONWEALTH OF MASSACHUSETTS

*In Convention of the Delegates of the People of the Commonwealth of Massachusetts, 1788*

The Convention, having impartially discussed and fully considered the Constitution for the United States of America, reported to Congress by the Convention of delegates from the United States of America, and submitted to us by a resolution of the General Court of the said commonwealth, passed the twenty-fifth day of October last past; and acknowledging, with grateful hearts, the goodness of the Supreme Ruler of the universe in affording the people of the United States, in the course of his providence, an opportunity, deliberately and peaceably, without fraud or surprise, of entering into an explicit and solemn compact with each other, by assenting to and ratifying a new Constitution, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to themselves and their posterity, DO, in the name and in behalf of the people of the commonwealth of Massachusetts, assent to and ratify the said Constitution for the United States of America.

And, as it is the opinion of this Convention, that certain amendments and alterations in the said Constitution would remove the fears and quiet the apprehensions of many of the good people of the commonwealth, and more effectually guard against an undue administration of the federal government, the Convention do therefore recommend that the following alterations and provisions be introduced into the said Constitution:

*First.* That it be explicitly declared, that all powers not expressly delegated by the aforesaid Constitution are reserved to the several states, to be by them exercised.

*Secondly.* That there shall be one representative to every thirty thousand persons, according to the census mentioned in the Constitution, until the whole number of representatives amount to two hundred.

*Thirdly.* That Congress do not exercise the powers vested in them by the 4th section of the 1st article, but in cases where a state shall neglect or refuse to make the regulations therein mentioned, or shall make regulations subversive of the rights of the people to a free and equal representation in Congress, agreeably to the Constitution.

*Fourthly.* That Congress do not lay direct taxes, but when the moneys arising from the impost and excise are insufficient for the public exigencies, nor then, until Congress shall have first made a requisition upon the states, to assess, levy, and pay their respective proportion of such requisitions, agreeably to the census fixed in the said Constitution, in such way and manner as the legislatures of the states shall think best, and, in such case, if any state shall neglect or refuse to pay its proportion, pursuant to such requisition, then Congress may assess and levy such state's proportion, together with interest thereon, at the rate of six per cent. per annum, from the time of payment prescribed in such requisitions.

*Fifthly.* That Congress erect no company with exclusive advantages of commerce.

*Sixthly.* That no person shall be tried for any crime, by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces.

*Seventhly.* The Supreme Judicial Federal Court shall have no jurisdiction of causes between citizens of different states, unless the matter in dispute, whether it concern the realty or personalty, be of the value of three thousand dollars at the least; nor shall the federal judicial powers extend to any action between citizens of different states, where the matter in dispute, whether it concern the realty or personalty, is not of the value of fifteen hundred dollars at the least.

*Eighthly.* In civil actions between citizens of different states, every issue of fact, arising in actions at common law, shall be tried by a jury, if the parties, or either of them, request it.

*Ninthly.* Congress shall at no time consent that any person holding an office of trust or profit, under the United States, shall accept of a title of nobility, or any other title or office, from any king, prince, or foreign state.

And the Convention do, in the name and in the behalf of the people of this commonwealth, enjoin it upon their representatives in Congress, at all times, until the alterations and provisions aforesaid have been considered, agreeably to the 5th article of the said Constitution, to exert all their influence, and use all reasonable and legal methods, to obtain a ratification of the said alterations and provisions, in such manner as is provided in the said article.<sup>1</sup>

And, that the United States, in Congress assembled, may have due notice of the assent and ratification of the said Constitution by this Convention, it is

*Resolved,* That the assent and ratification aforesaid be engrossed on parchment, together with the recommendation and injunction aforesaid, and with this resolution; and that his excellency, JOHN HANCOCK, President, and the Hon. WILLIAM CUSHING, Esq., Vice-President of this Convention, transmit the same, countersigned by the Secretary of the Convention, under their hands and seals, to the United States in Congress assembled.

### b. New York Circular Letter

[*Elliot's Debates*, vol. II, pp. 413-414.]

#### THE CIRCULAR LETTER,

*from the Convention of the State of New York to the governors of the several states in the Union*

Poughkeepsie, July 28, 1788

SIR:

We, the members of the Convention of this state, have deliberated and maturely considered the Constitution proposed for the United States. Several articles in it appear so exceptionable to a majority of us, that nothing but the fullest confidence of obtaining a revision of them by

<sup>1</sup> It may be noted that Massachusetts, in spite of this action, did not ratify the first ten amendments until 1939. Connecticut and Georgia, of the original thirteen states, also ratified these amendments only in 1939.

general convention, and an invincible reluctance to separating from our sister states, could have prevailed upon a sufficient number to ratify it, without stipulating for previous amendments. We all unite in opinion, that such a revision will be necessary to recommend it to the approbation and support of a numerous body of our constituents.

We observe that amendments have been proposed, and are anxiously desired, by several of the states, as well as by this; and we think it of great importance that effectual measures be immediately taken for calling a convention, to meet at a period not far remote; for we are convinced that the apprehensions and discontents, which those articles occasion, cannot be removed or allayed, unless an act to provide for it be among the first that shall be passed by the new Congress.

As it is essential that an application for the purpose should be made to them by two thirds of the states, we earnestly exhort and request the legislature of your state to take the earliest opportunity of making it. We are persuaded that a similar one will be made by our legislature, at their next session; and we ardently wish and desire that the other states may concur in adopting and promoting the measure.

It cannot be necessary to observe, that no government, however constructed, can operate well, unless it possesses the confidence and goodwill of the body of the people; and as we desire nothing more than that the amendments proposed by this or other states be submitted to the consideration and decision of a general convention, we flatter ourselves that motives of mutual affection and conciliation will conspire with the obvious dictates of sound policy to induce even such of the states as may be content with every article in the Constitution to gratify the reasonable desires of that numerous class of American citizens who are anxious to obtain amendments of some of them.

Our amendments will manifest that none of them originated in local views, as they are such as, if acceded to, must equally affect every state in the Union. Our attachment to our sister states, and the confidence we repose in them, cannot be more forcibly demonstrated than by acceding to a government which many of us think very imperfect, and devolving the power of determining whether that government shall be rendered perpetual in its present form, or altered agreeably to our wishes, and a minority of the states with whom we unite.

We request the favor of your excellency to lay this letter before the legislature of your state; and we are persuaded that your regard for our national harmony and good government will induce you to promote a measure which we are unanimous in thinking very conducive to those interesting objects.

We have the honor to be, with the highest respect, your excellency's most obedient servants.

By the unanimous order of the Convention,

GEORGE CLINTON,  
President

## 10. NATIONAL CONSTITUTIONAL CONVENTION

No national constitutional convention has been held since 1787, although the convention is a common device for revising state constitutions. A national convention is possible, however, and the procedure for securing one has been begun on many occasions, and probably was important, if not decisive, in forcing the submission of the Seventeenth Amendment.

### a. Table of Legislative Applications

[*Senate Document No. 78*, 71 Cong., 2 Sess. (presented by Mr. Tydings, Jan. 6 [calendar day, Feb. 1], 1930), pp. 2-3, 31-32.]

### APPLICATIONS OF STATE LEGISLATURES FOR A CONVENTION FOR PROPOSING AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

#### ARTICLE A

The Congress \* \* \* on the application of the legislatures of two-thirds of the several States, shall call a convention proposing amendments. \* \* \*

#### NOTES

The dates of presentation to Congress in the following table are taken from the Congressional Record (or, in the case of the four early applications, from the Journals) and the dates of application by the legislature are taken from the text of the resolutions printed in the Congressional Record or in the session laws of the State, or, in a few cases, from the journals of the legislature.

Those marked (a) were presented to Congress April 30, 1908, in "Memorial of Hon. C. N. Haskell, Governor of the State of Oklahoma, relative to amending the Constitution of the United States which was printed as Senate Document No. 454, of the Sixtieth Congress, first session. No earlier date of presentation has been found in these cases.

STATE	DATE OF APPLICATION BY LEGISLATURE	DATE OF PRESENTATION IN CONGRESS	AMENDMENT TO BE PRESENTED
Alabama.....	Jan. 12, 1833	Feb. 19, 1833 (Senate Journal, vol. 23, p. 194).	Against protective tariff.
Arkansas.....	Apr. 25, 1901	(a) .....	Direct election of Senators.
Do.....	Mar. 14, 1903	.....	Limited to direct election of Senators.
California.....	Feb. 27, 1903	.....	Do.
Do.....	Mar. 3, 1911	June 13, 1911 (Rec. 47, p. 2000) ....	Do.
Colorado.....	Apr. 1, 1901	Dec. 4, 1901 .....	General, including direct election of Senators.
Delaware.....	Feb. 11, 1907	Feb. 17, 1907 (Rec., vol. 41, p. 3011)	Prohibition of polygamy.
Georgia.....	Dec. 12, 1832	Jan. 9, 1833 (Senate Journal, vol. 23, p. 65).	General.

STATE	DATE OF AP- PLICATION BY LEGISLATURE	DATE OF PRESENTATION IN CONGRESS	AMENDMENT TO BE PRESENTED
Idaho.....	Feb. 26, 1901	Dec. 16, 1901.....	Direct election of President, Vice President, and Senators.
Do.....	Mar. 3, 1903	.....	Limited to direct election of Senators.
Illinois.....	Apr. 9, 1903	(a).....	General, including direct elec- tion of Senators.
Do.....	May 10, 1907	Dec. 5, 1907 (Rec., vol. 42, p. 164)	Limited to direct election of Senators.
Do.....	Apr. 7, 1909	.....	Do.
Do.....	May 11, 1911	May 18, 1911 (Rec., vol. 47, p. 1298)	Control of trusts.
Do.....	Mar. 12, 1913	Apr. 8, 1913 (Rec., vol. 50, pp. 120, 121).	Prohibition of polygamy.
Indiana.....	Mar. 11, 1907	(a).....	General, including direct elec- tion of Senators.
Iowa.....	Mar. 24, 1904	Apr. 18, 1904 (Rec., vol. 38, p. 4959)	Limited to direct election of Senators.
Do.....	Mar. 12, 1904	Dec. 9, 1907.....	General, including direct elec- tion of Senators.
Do.....	Apr. 12, 1909	Apr. 30, 1909 (Rec., vol. 44, p. 1620)	Do.
Kansas.....	Apr. 17, 1901	(a).....	Do.
Do.....	Feb. 6, 1907	Feb. 14, 1907 (Rec., vol. 41, p. 2029)	Do.
Kentucky.....	Feb. 10, 1902	(a).....	Limited to direct election of Senators.
Louisiana.....	Nov. 25, 1907	(a) May 8, 1908.....	General, including direct elec- tion of Senators.
Maine.....	Feb. 22, 1911	Mar. 4, 1911 (Rec., vol. 46, p. 4280)	Limited to direct election of Senators.
Michigan.....	May 8, 1901	Dec. 4, 1901.....	Do.
Do.....	Apr. 21, 1913	July 2, 1913 (Rec., vol. 50, p. 2290)	Prohibition of polygamy.
Minnesota.....	Feb. 9, 1901	Feb. 18, 1901.....	Limited to direct election of Senators.
Missouri.....	Mar. 13, 1901	.....	Do.
Do.....	Mar. 18, 1905	Dec. 6, 1905 (Rec., vol. 40, p. 138)	Do.
Do.....	Mar. 6, 1907	(a).....	General.
Do.....	Apr. 15, 1913	May 29, 1913 (Rec., vol. 50, p. 1796)	Constitutionality of State en- actment.
Montana.....	Feb. 21, 1901	Dec. 9, 1901 (Rec., vol. 35, p. 208)	Limited to direct election of Senators.
Do.....	Jan. 31, 1905	Feb. 13, 1905 (Rec., vol. 39, p. 2447)	Do.
Do.....	Feb. 21, 1907	Jan. 15, 1908.....	Do.
Do.....	Feb. 2, 1911	Feb. 13, 1911 (Rec., vol. 46, p. 2411)	General, including direct elec- tion of Senators.
Do.....	Mar. 1, 1911	Apr. 6, 1911 (Rec., vol. 47, p. 98)...	Prohibition of polygamy.
Nebraska.....	Apr. 14, 1893	.....	Limited to direct election of Senators.
Do.....	Feb. 21, 1901	Feb. 14, 1902.....	Do.
Do.....	Mar. 25, 1903	(a).....	Do.
Do.....	Apr. 3, 1907	Dec. 9, 1907.....	General, including direct elec- tion of Senators.
Do.....	Mar. 14, 1911	Apr. 6, 1911 (Rec., vol. 47, p. 99)...	Prohibition of polygamy.
Nevada.....	Mar. 20, 1901	Dec. 4, 1901.....	Limited to direct election of Senators.
Do.....	Feb. 25, 1903	Mar. 10, 1903.....	Do.
Do.....	Mar. 6, 1907	Dec. 5, 1907 (Rec., vol. 42, p. 163)	General, including direct elec- tion of Senators.
New Jersey....	May 28, 1907	Dec. 5, 1907 (Rec., vol. 42, p. 164)	Limited to direct election of Senators.
New York.....	Feb. 5, 1789	May 6, 1789.....	General.
Do.....	Mar. 2, 1906	Apr. 2, 1906 (Rec., vol. 40, p. 4551)	Prohibition of polygamy.
North Carolina	Mar. 13, 1901	.....	Limited to direct election of Senators.
Do.....	Mar. 11, 1907	(a).....	General, including direct elec- tion of Senators.



STATE	DATE OF APPLICATION BY LEGISLATURE	DATE OF PRESENTATION IN CONGRESS	AMENDMENT TO BE PRESENTED
Ohio.....	Mar. 15, 1911	Apr. 27, 1911 (Rec., vol. 47, pp. 660, 661).	Prohibition of polygamy.
Oklahoma.....	Jan. 9, 1908	Apr. 30, 1909.....	General, including direct election of Senators.
Oregon.....	Jan. 25, 1901	Feb. 12, 1901 (Rec., vol. 34, p. 2290)	Do.
Do.....	Feb. 23, 1901	Dec. 4, 1901 (Rec., vol. 35, p. 172)	Limited to direct election of Senators.
Do.....	Jan. 27, 1903	Feb. 25, 1903 (Rec., vol. 36, p. 2597)	Do.
Do.....	Mar. 10, 1903	(a).....	Do.
Do.....	Jan. 26, 1909	Feb. 9, 1909 (Rec., vol. 43, p. 2071)	Do.
Pennsylvania..	Feb. 13, 1901	(a).....	Do.
South Dakota..	1901.....	.....	Do.
Do.....	Feb. 2, 1907	Feb. 8, 1907.....	Do.
Do.....	Feb. 5, 1909	Feb. 19, 1909 (Rec., vol. 43, p. 2670)	Prohibition of polygamy.
Do.....	Feb. 8, 1909	Feb. 20, 1909 (Rec., vol. 43, p. 2761)	Limited to direct election of Senators.
Tennessee.....	Jan. 23, 1901	Mar. 4, 1902 (Rec., vol. 35, p. 2344)	Do.
Do.....	Mar. 22, 1905	(a).....	Do.
Do.....	Feb. 17, 1911	Apr. 13, 1911 (Rec., vol. 47, p. 187)	Prohibition of polygamy.
Texas.....	June 5, 1899	Dec. 11, 1899.....	General.
Do.....	Apr. 17, 1901	.....	Limited to direct election of Senators.
Utah.....	Mar. 12, 1903	(a).....	Do.
Vermont.....	Dec. 18, 1912	Jan. 13, 1913 (Rec., vol. 49, p. 1433)	Prohibition of polygamy.
Virginia.....	Nov. 14, 1788	May 5, 1789 (Annals of Cong., 1st Cong., 1st-2d sess., p. 248).	General.
Washington...	Mar. 18, 1901	(a).....	.....
Do.....	Mar. 12, 1903	(a) Feb. 21, 1911.....	General, including direct election of Senators.
Do.....	Feb. 26, 1909	Mar. 16, 1909 (Rec., vol. 44, p. 50)	Prohibition of polygamy.
Wisconsin.....	May 1, 1903	Nov. 16, 1903.....	Limited to direct election of Senators.
Do.....	July 8, 1907	Dec. 5, 1907 (Rec., vol. 42, p. 165)	Do.
Do.....	Mar. 25, 1913	Apr. 7, 1913 (Rec., vol. 50, p. 42)	Prohibition of polygamy.
Do.....	( <sup>1</sup> )	Sept. 23, 1929.....	General.
Wyoming.....	Feb. 16, 1895	(a).....	Election of Senators.

<sup>1</sup> No date given.

#### SOURCE OF INFORMATION

- AMES, H. V.: The proposed amendments to the Constitution of the United States during the century of its history (pp. 281-284, 60th Cong., 1st sess., S. Doc. No. 454).
- OWEN, ROBERT L.: Speech in Senate, May 31, 1910. (Cong. Rec., vol. 45, pp. 7113-7120.)
- TULLER, WALTER K.: A convention to amend the Constitution—Why needed—How it may be obtained. (North American Review, vol. 193, pp. 369-387, March, 1911.)
- WHITTEN, ROBERT H.: The spread of legislation and the need for improved legislative methods. In Proceedings of Second Annual Meeting of Association of Life Insurance Presidents, 1908, p. 1, footnote.)
- A manuscript index of State memorials for amending the Constitution, 1889-1915, prepared in the legislative reference division, Library of Congress.

#### Editors' Note:

Several additional applications have been made since this compilation was made, such as:

- Massachusetts—1931—prohibition repeal
- New York —1931—prohibition repeal
- California —1935—tax exempt securities and regulation of labor conditions [2 separate applications]
- Minnesota —1939—tax exempt securities
- Oregon —1939—Townsend Plan
- Wyoming —1939—income tax limitation

**b. Application of Wisconsin Legislature**

[Text in *Congressional Record*, vol. 71, pt. 4, p. 3856 (Sept. 23, 1929).]

JOINT RESOLUTION No. 83, S

Joint resolution memorializing the Congress of the United States to discharge the mandatory duties imposed upon it by Article V of the Constitution of the United States to call a convention to propose amendments to the Constitution.

Whereas the legislatures of the following 35 States have filed a formal application with Congress to call a convention for the purpose of proposing amendments to the Constitution of the United States: Alabama, Arkansas, California, Colorado, Delaware, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, and Wisconsin; and

Whereas Article V of the Constitution of the United States reads as follows: [then follows the text of Article V] . . .

Whereas this article makes it mandatory upon the Congress of the United States to call a convention for the purpose of proposing amendments to the Constitution whenever two-thirds of the States shall have made application therefor; now, therefore, be it

*Resolved by the senate (the assembly concurring)*, That the Legislature of the State of Wisconsin respectfully requests that the Congress of the United States perform the mandatory duty imposed upon it by the above quoted Article V and forthwith call a convention to propose amendments to the constitution of the United States. Be it further

*Resolved*, That properly attested copies of this resolution be transmitted to the presiding officers of both Houses of the Congress of the United States and to each Wisconsin Member thereof.

HENRY A. HUBER,  
*President of the Senate.*

O. G. MUNSON,  
*Chief Clerk of the Senate.*

CHAS. B. PERRY,  
*Speaker of the Assembly.*

C. E. SHAFFER,  
*Chief Clerk of the Assembly.*

## 11. CONVENTION SYSTEM OF RATIFICATION

The Constitution provides for two possible methods of ratifying proposed amendments, by state legislatures or by state conventions, Congress to determine in each case which of these methods to use. Until the submission of the 21st (Prohibition Repeal) Amendment in 1933, the legislative method had been uniformly required, but on that occasion Congress submitted the proposed amendment to state conventions. It was therefore necessary for the first time to work out and apply new procedures of ratification.

### a. Method of Ratification

["Ratification of the Twenty-First Amendment to the Constitution of the United States." *State Department Publication No. 573* (1934), pp. 5-10, 14-15.]

### ACTION BY THE STATES

Prior to 1933 there existed no legislation on the subject of conventions in the States under article V of the Constitution; but at the time of the communication of the proposed [21st] amendment to the Governors of the States by the Secretary of State, the legislatures of numerous States were in regular session; others met in special session; during the year 1933 statutes were enacted<sup>a</sup> in forty-three States (all except Georgia, Kansas, Louisiana, Mississippi, and North Dakota) providing for action upon the proposed amendment; those enactments are of varied forms; some are general, covering similar future cases; others are limited to the proposal then pending; and in respect of the methods of selection of delegates to the convention, of the apportionment (*e.g.*, "State-wide" or by districts), of the numbers of such delegates (*e.g.*, 3 in New Mexico, 329 in Indiana), of the dates of meeting, of instructions from the electorate, and of other matters, there is diversity of substance as among the States.

During the year 1933, pursuant to State statutes (of forty-three States) to which reference has been made, conventions met in thirty

<sup>a</sup> One of those statutes, that of Wyoming, of February 18, 1933, preceded the proposed amendment; the other dates (1933) are: Alabama, March 28; Arizona, March 18; Arkansas, March 24; California, April 21; Colorado, August 10; Connecticut, April 10, May 5; Delaware, April 11; Florida, June 7; Idaho, March 11; Illinois, April 28; Indiana, March 8; Iowa, April 10; Kentucky, September 11; Maine, March 31; Maryland, April 5; Massachusetts, April 20; Michigan, March 11; Minnesota, April 13; Missouri, April 13; Montana, March 17; Nebraska, May 1; Nevada, March 25; New Hampshire, May 6; New Jersey, March 23; New Mexico, March 13, 15; New York, April 6; North Carolina, May 9; Ohio, March 23; Oklahoma, July 18; Oregon, March 15; Pennsylvania, May 3; Rhode Island, April 7; South Carolina, May 9; South Dakota, March 8; Tennessee, March 11; Texas, May 16; Utah, March 21; Vermont, March 22; Virginia, August 11; Washington, March 20; West Virginia, March 10, April 12; Wisconsin, March 5.

eight States of the Union; thirty-seven of those conventions ratified the twenty-first amendment to the Constitution; one convention (in South Carolina) rejected it; under the statute of North Carolina the electorate (on November 7, 1933) voted for convention delegates but also voted by a large majority (293,484 to 120,190) against the holding of a convention; the laws enacted in four States (Montana, Nebraska, Oklahoma, and South Dakota) made provision for the choice of convention delegates in 1934.

It will be observed that pursuant to section 160, title 5, United States Code (quoted above, p. 3), official notice of the action in the various States is to be given to the Secretary of State; the papers evidencing such action are of various forms but similar in substance; they are too voluminous to be here set forth at length; in general they are signed by officers of the convention (sometimes by all delegates present), authenticated under the great seal of the State, and contain the text of the resolution of ratification (or rejection) and reference to other procedure (such as statute, executive proclamation, election of delegates, organization, *et cetera*). In no case did the proceedings of a convention continue beyond the day of its meeting.

Prior to December 2, 1933, papers evidencing ratification of the proposed amendment by conventions in thirty-two States had been received at the Department of State; and the Department had then also been informed that the convention which met in Texas on November 24, 1933, had ratified the proposed amendment and that the authenticated papers were in the mail (they were received at the Department on December 4); it was, moreover, common knowledge that conventions would meet in Ohio, Pennsylvania, and Utah on December 5, 1933, and that the conventions in these three States would also ratify, bringing the total number of ratifying States to thirty-six, the requisite three fourths of the whole number.

On Saturday, December 2, 1933, the Acting Secretary of State sent the following telegram to the Governor of Ohio (and identic telegrams, *mutatis mutandis*, to the Governors of Pennsylvania and Utah):

Will you please request the Secretary of State of Ohio to send me as soon as possible after action by the Convention to be held in Ohio on December 5, 1933, a telegram in substantially the following language signed by him as Secretary of State of Ohio BEGINS You are hereby officially notified that on December 5, 1933, a convention duly held in the State of Ohio ratified on behalf of the said State the proposed Amendment to the Constitution of the United States providing for the repeal of the Eighteenth Amendment, and the duly authenticated papers evidencing the action of said Convention are being forwarded to you ENDS

Under the respective relevant statutes of Ohio, Pennsylvania, and Utah, the Secretary of State of the State was the official charged with the duty of notifying the Secretary of State of the United States of the action of the State convention.

On December 5, 1933, at 12:55 p.m., the Department of State received a telegram from the Honorable Richard J. Beamish, Secretary of the Commonwealth of Pennsylvania, giving official notice that the convention in Pennsylvania had at 12:50 p.m. on that date ratified the proposed amendment to the Constitution. Duly authenticated papers further evidencing the action of the convention in Pennsylvania were the next day after received in triplicate originals by the Department of State. One of those three originals was received at the Department at 3:45 p.m., on December 5, 1933, having been transmitted from Harrisburg by airplane piloted by an officer of the Pennsylvania National Guard Air Squadron. At 3:50 p.m., on December 5, 1933, the second original, which a patrolman of the Pennsylvania State Highway Patrol had brought to Washington by motorcycle, was received at the Department. The third original of the authenticated papers from Pennsylvania was received at the Department by registered mail on December 6, 1933.

At 2:53 p.m. on December 5, 1933, the following telegram was received at the Department from the Secretary of State of Ohio:

HOUSE OF REPRESENTATIVES  
*Columbus Ohio, Dec 5, 1933*

HON WILLIAM PHILLIPS  
*Acting Secretary of State*  
*Washington DC*

You are hereby officially notified that on December 5 1933 a convention duly held in the State of Ohio ratified on behalf of the said state the proposed amendment to the Constitution of the United States providing for the repeal of the Eighteenth Amendment and the duly authenticated papers evidencing the action of said Convention are being forwarded to you.

GEORGE S MYERS  
*Secretary of State*

Forthwith upon receipt of the telegram (at 2:59 p.m.) the message was verified by a telephone conversation had with the Secretary of State of Ohio by an official of the Department of State. The authenticated papers further evidencing the action of the convention in Ohio were received in the Department by registered mail and special delivery on December 7, 1933.

Information of the action of the convention in Ohio was given directly to the President by the Secretary of State of Ohio in a telegram received at the White House on December 5, 1933.

At 5:35 p.m., on December 5, 1933, the following telegram was received at the Department from the Secretary of State of Utah:

STATE HOUSE, SALT LAKE CITY UTAH,  
Dec 5 33

HON WILLIAM PHILLIPS  
*Acting Secretary of State, Washington DC*

You are hereby officially notified that on December 5 1933 a Convention duly held in the state of Utah ratified on behalf of the said state the proposed Amendment to the Constitution of the United States providing for the repeal of the Eighteenth Amendment at 3:32½ p.m. and the duly authenticated papers evidencing the action of said Convention will go forward to you by air mail at 1.15 a.m. Wednesday December 6th.

MILTON H WELLING,  
*Secretary of State of Utah.*

As first received, the time of action by the convention of the State of Utah, as stated in the telegram, was given as 3:32 p.m.; but within a few minutes (5:47 p.m.) this was corrected to 3:32½ p.m. It is to be remembered that 3:32½ p.m. in Utah (Mountain Standard Time) is 5:32½ p.m. in Washington (Eastern Standard Time).

The quoted telegram from the Secretary of State of Utah was verified at 6:00 p.m. by a telephone conversation had by an official of the Department of State with the Secretary of State of Utah and continued also with the Honorable Ray L. Olson, the President of the convention in Utah.

Information of the action of the convention in Utah was given directly to the President by the Governor of Utah in a telegram received at the White House at 5:40 p.m. on December 5, 1933.

The duly authenticated papers further evidencing the action of the convention in Utah were received at the Department of State by airmail on December 7, 1933.

On December 7, 1933, the Department of State received the following notification of the action of the convention in South Carolina on December 4, 1933, rejecting the twenty-first amendment to the Constitution:

BE IT RESOLVED by the Delegates duly elected and assembled in this Convention of South Carolina for the purpose of ratifying or rejecting the proposed Twenty-first Amendment to the Constitution of the United States that the said Twenty-first Amendment be, and the same hereby is rejected.



RESOLVED, further, that the Original of this Resolution duly signed by the President of this Convention and attested by the Secretary be filed with the Secretary of State of the State of South Carolina, and a certified copy be filed with the Secretary of State of the United States at Washington, D.C.

Done in Convention in Columbia on the fourth day of December, in the year of our Lord one thousand nine hundred and thirty-three.

HENRY N. SNYDER,  
*President of the Convention*

Attest:

W. W. SMOAK,  
*Secretary of the Convention.*

On December 6, 1933, a convention in the State of Maine ratified the twenty-first amendment to the Constitution. The duly authenticated papers evidencing the action of the convention in Maine were received at the Department of State by mail on December 8, 1933.

#### CERTIFICATE OF THE ACTING SECRETARY OF STATE

The certificate required by section 160, title 5, United States Code (quoted above, p. 3), was signed by the Acting Secretary of State at 6:37 p.m., December 5, 1933, as follows:

WILLIAM PHILLIPS

ACTING SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

*To All to Whom These Presents Shall Come, Greeting:*

KNOW YE, That the Congress of the United States, at the second session, seventy-second Congress begun and held at the City of Washington on Monday, the fifth day of December, in the year one thousand nine hundred and thirty-two, passed a Joint Resolution in the words and figures as follows: to wit—

#### JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:*

“ARTICLE—

“Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

“Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

“Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress.”

And, further, that it appears from official notices received at the Department of State that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by conventions in the States of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

And, further, that the States wherein conventions have so ratified the said proposed Amendment, constitute the requisite three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, William Phillips, Acting Secretary of State of the United States, by virtue and in pursuance of Section 160, Title 5, of the United States Code, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

DONE at the City of Washington this fifth day of December, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL]

WILLIAM PHILLIPS  
*Acting Secretary of State.*

The votes in the ratifying conventions, as these appear from the records of the Department of State (completed from other sources, in part unofficial) were as follows:

RESOLVED, further, that the Original of this Resolution duly signed by the President of this Convention and attested by the Secretary be filed with the Secretary of State of the State of South Carolina, and a certified copy be filed with the Secretary of State of the United States at Washington, D.C.

Done in Convention in Columbia on the fourth day of December, in the year of our Lord one thousand nine hundred and thirty-three.

HENRY N. SNYDER,  
*President of the Convention.*

Attest:

W. W. SMOAK,  
*Secretary of the Convention.*

On December 6, 1933, a convention in the State of Maine ratified the twenty-first amendment to the Constitution. The duly authenticated papers evidencing the action of the convention in Maine were received at the Department of State by mail on December 8, 1933.

#### CERTIFICATE OF THE ACTING SECRETARY OF STATE

The certificate required by section 160, title 5, United States Code (quoted above, p. 3), was signed by the Acting Secretary of State at 6:37 p.m., December 5, 1933, as follows:

WILLIAM PHILLIPS

ACTING SECRETARY OF STATE OF THE UNITED STATES OF AMERICA

*To All to Whom These Presents Shall Come, Greeting:*

KNOW YE, That the Congress of the United States, at the second session, seventy-second Congress begun and held at the City of Washington on Monday, the fifth day of December, in the year one thousand nine hundred and thirty-two, passed a Joint Resolution in the words and figures as follows: to wit—

#### JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:*

"ARTICLE—

"Section 1. The eighteenth article of amendment to the Constitution of the United States is hereby repealed.

"Sec. 2. The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

"Sec. 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission hereof to the States by the Congress."

And, further, that it appears from official notices received at the Department of State that the Amendment to the Constitution of the United States proposed as aforesaid has been ratified by conventions in the States of Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

And, further, that the States wherein conventions have so ratified the said proposed Amendment, constitute the requisite three-fourths of the whole number of States in the United States.

Now, therefore, be it known that I, William Phillips, Acting Secretary of State of the United States, by virtue and in pursuance of Section 160, Title 5, of the United States Code, do hereby certify that the Amendment aforesaid has become valid to all intents and purposes as a part of the Constitution of the United States.

IN TESTIMONY WHEREOF, I have hereunto set my hand and caused the seal of the Department of State to be affixed.

DONE at the City of Washington this fifth day of December, in the year of our Lord one thousand nine hundred and thirty-three.

[SEAL]

WILLIAM PHILLIPS  
*Acting Secretary of State.*

The votes in the ratifying conventions, as these appear from the records of the Department of State (completed from other sources, in part unofficial) were as follows:

STATE	NUMBER OF DELEGATES	AYES	NOES
Alabama	116	103	0
Arizona	14	14	0
Arkansas	75	*75	0
California	22	22	0
Colorado	15	15	0
Connecticut	50	50	0
Delaware	17	17	0
Florida	67	62	0
Idaho	21	21	0
Illinois	50	50	0
Indiana	329	246	83
Iowa	99	90	0
Kentucky	19	19	0
Maine	80	72	0
Maryland	24	24	0
Massachusetts	45	45	0
Michigan	100	99	1
Minnesota	21	21	0
Missouri	68	68	0
Nevada	40	39	0
New Hampshire	10	9	0
New Jersey	226	202	2
New Mexico	3	3	0
New York	150	150	0
Ohio	52	52	0
Oregon	116	110	5
Pennsylvania	15	15	0
Rhode Island	31	31	0
Tennessee	63	57	0
Texas	31	25	0
Utah	21	21	0
Vermont	14	14	0
Virginia	30	30	0
Washington	99	94	4
West Virginia	20	20	0
Wisconsin	15	15	0
Wyoming	66	†64	0

\* The "vote of the convention" under the Arkansas statute of March 24, 1933. The roll-call was 42 ayes, 15 noes, with 18 absent or not voting.

† Two delegates were absent; 64 "aye" votes were cast by 65 delegates, 3 of whom had  $\frac{2}{3}$  of one vote each.

## 12. POPULAR CONTROL OF AMENDING PROCESS

In the amending article of the Constitution, there is no provision for direct popular participation. Several states have, however, adopted the initiative and referendum as means of popular control over actions of the legislatures. In Ohio, which had adopted such initiative and referendum provisions in 1912, the referendum was in 1918 extended specifically to action of the legislature with respect to

b. Ballots with respect to Prohibition Repeal

(1) FLORIDA BALLOT

OFFICIAL BALLOT NO. \_\_\_\_\_

OFFICIAL BALLOT

Special Election October 10, A. D. 1933, under provisions of Chapter 16180, Laws of Florida, call a Convention to act upon the ratification or rejection of a proposed Amendment to the Constitution of the United States providing in substance:

1. The repeal of the Eighteenth Amendment to the Constitution of the United States.
2. Prohibiting transportation or importation into States, Territories, or possessions of the U. S. for delivery or use therein of intoxicating liquors in violation of the laws thereof.

Precinct No. \_\_\_\_\_ Leon County

Make a cross (X) mark BEFORE the name of the candidate of your choice.  
For delegates to the Convention. VOTE FOR 67.

GROUP A

Favoring Ratification  
(For Repeal)

ROBERT H. ANDERSON  
HENRY CLAY ARMSTRONG  
GEORGE H. ASBELL  
CLAYTON A. AVRIETT  
CLAUDE H. BARNES  
FLETCHER A. BLACK  
JOHN LYNN BLACKWELL  
NATHAN H. BOSWELL, SR.  
JAMES E. CALKINS  
REBECCA A. CAMP  
GUILFORD M. CANNON, III  
MARTIN CARABALLO  
CALVIN D. CHRIST, M. D.  
VAL C. CLEARY  
ALSTON COCKRELL  
CLAYTON C. CODRINGTON  
HAROLD COLEE  
HENRY EDMUND CORRY  
HATTIE R. CRAWFORD  
JESSIE CURRIE  
HELEN GLENN DANN

GROUP C

Unpledged

WILLIAM ABENATHY  
CHARLES RUCKER ADAMS  
R. W. ALLEN  
WILLIAM FARIS ANDERSON  
THOMAS H. ANDERSON  
SARA ELIZABETH BARDIN  
JOSEPH FRANCIS BAYA  
SUSIE SMITH BELL  
JAMES MONROE BIDDLE  
SALLIE E. BLAKE  
W. J. BLEDSOE  
BENJ. BREWTON BLITCH  
JAMES WALTER BLUME  
MORRIS BUTLER BOOK  
JESSE HASTINGS BRATLEY  
ANNA CRESSEY BRENIZER  
HUGH LOGAN BROWNLEE  
ALLEN BRYAN  
N. C. BRYAN  
FRANK E. BRYANT  
W. S. BUNDY  
JAMES H. BUNCH

GROUP C—(Continued)

WALTER WILLIAM RUS  
JOHN H. SCHLEUCHER  
E. LYMAN SCOTT  
ARTHUR A. (JACK) SM  
WILLIAM PRESTON SM  
JAMES HENRY SMITH  
ALBERT P. SMITH  
CHAS. S. STEELE  
CLARENCE A. STEVENS  
R. FRANK VALENTINE  
JOHN G. VAN NESS  
MILLER WALTON  
O. K. WHITFIELD  
JOSEPH S. WILENSKY  
A. K. WILSON  
FRANCIS C. WILSON  
CORINNE T. YARBROUG  
CHAS. GEO. YARBROUG



# SPECIMEN BALLOT

To Be Voted Monday, June 5, 1933

Champaign County, Illinois

## BALLOT

FOR DELEGATES TO THE STATE CONVENTION TO CONSIDER THE FOLLOWING PROPOSED  
AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES  
JOINT RESOLUTION

Proposing an amendment to the Constitution of the United States.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (Two-thirds of each House concurring therein,) That the following article is hereby proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as part of the Constitution when ratified by conventions in three-fourths of the several States:*

## ARTICLE

SECTION 1. The Eighteenth article of Amendment to the Constitution of the United States is hereby repealed

SECTION 2. The transportation or importation into any State, Territory or possession of the United States for delivery or use therein of intoxicating liquor, in violation of the laws thereof, is hereby prohibited.

SECTION 3. This article shall be inoperative unless it shall have been ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution, within seven years from the date of the submission thereof to the States by the Congress.

## INSTRUCTIONS TO VOTERS

A cross in any circle will count a vote for each candidate in the column under the circle.

A cross in any circle will not count a vote for any candidate in the column under the circle if any candidate is voted for in another column.

A cross in the square at the left of the name of any candidate will count one vote for such candidate.

### FOR RATIFICATION

For Repeal  
of 18th Amendment



- ☐ P. A. NASH  
3234 W. Washington Boulevard, Chicago
- ☐ GEORGE F. HARDING  
4853 Lake Park Avenue, Chicago
- ☐ WILLIAM L. O'CONNELL  
4418 Drexel Boulevard, Chicago
- ☐ EDWARD F. MOORE  
4845 W. Washington Boulevard, Chicago
- ☐ OSCAR F. MAYER  
5727 Sheridan Road, Chicago
- ☐ JACOB M. ARVEY  
3716 Douglas Boulevard, Chicago
- ☐ LIN TOMAN

### AGAINST RATIFICATION

Against Repeal  
of 18th Amendment



- ☐ HENRY W. AUSTIN  
1022 Lake Street, Oak Park
- ☐ WILLIAM P. ALLIN  
McLean
- ☐ HUGH M. BANNEN  
Rockford
- ☐ ARTHUR M. BARNHART  
4455 Drexel Boulevard, Chicago
- ☐ MARY TITUS BEDELL  
Mount Carmel
- ☐ FRANK A. BENTLEY  
5895 Race Avenue, Chicago
- ☐ EDWARD E. BLAKE

### NO PREFERENCE EXPRESSED



the ratification of federal amendments. Under this provision of the Ohio constitution, a referendum was sought on the ratification by the legislature of that state of the 18th and later of the 19th Amendment. The supreme court of the state upheld the right to such referendum, but was on appeal reversed by the United States Supreme Court.

[*Hawke v. Smith* (1920), 253 U. S. 221, 227-231; 64 L. Ed. 871, 875-877.]

Mr. Justice Day delivered the opinion of the court: . . .

The 5th article is a grant of authority by the people to Congress. The determination of the method of ratification is the exercise of a national power specifically granted by the Constitution; that power is conferred upon Congress, and is limited to two methods: by action of the legislatures of three fourths of the states, or conventions in a like number of states. *Dodge v. Woolsey*, 18 How. 331, 348, 15 L. ed. 401, 407. The framers of the Constitution might have adopted a different method. Ratification might have been left to a vote of the people, or to some authority of government other than that selected. The language of the article is plain, and admits of no doubt in its interpretation. It is not the function of courts or legislative bodies, national or state, to alter the method which the Constitution has fixed.

All of the amendments to the Constitution have been submitted with a requirement for legislative ratification; by this method all of them have been adopted.

The only question really for determination is: What did the framers of the Constitution mean in requiring ratification by "legislatures?" That was not a term of uncertain meaning when incorporated into the Constitution. What it meant when adopted it still means for the purpose of interpretation. A legislature was then the representative body which made the laws of the people. The term is often used in the Constitution with this evident meaning. . . .

There can be no question that the framers of the Constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had they were no less accurate in the use of apt phraseology to carry out such purpose. The members of the House of Representatives were required to be chosen by the people of the several states. Article 1, § 2. . . .

The argument to support the power of the state to require the approval by the people of the state of the ratification of amendments to the Federal Constitution through the medium of a referendum rests upon the proposition that the Federal Constitution requires ratification by the

legislative action of the states through the medium provided at the time of the proposed approval of an amendment. This argument is fallacious in this,—ratification by a state of a constitutional amendment is not an act of legislation within the proper sense of the word. It is but the expression of the assent of the state to a proposed amendment.

At an early day this court settled that the submission of a constitutional amendment did not require the action of the President. The question arose over the adoption of the 11th Amendment. *Hollingsworth v. Virginia*, 3 Dall. 378, 1 L. ed. 644. In that case it was contended that the amendment had not been proposed in the manner provided in the Constitution, as an inspection of the original roll showed that it had never been submitted to the President for his approval, in accordance with Article 1 § 7, of the Constitution. The Attorney General answered that the case of amendments is a substantive act, unconnected with the ordinary business of legislation, and not within the policy or terms of the Constitution investing the President with a qualified negative on the acts and resolutions of Congress. In a footnote to this argument of the Attorney General, Justice Chase said: "There can surely be no necessity to answer the argument. The negative of the President applies only to the ordinary cases of legislation. He has nothing to do with the proposition, or adoption, of amendments to the Constitution." The court by a unanimous judgment held that the amendment was constitutionally adopted.

It is true that the power to legislate in the enactment of the laws of a state is derived from the people of the state. But the power to ratify a proposed amendment to the Federal Constitution has its source in the Federal Constitution. The act of ratification by the state derives its authority from the Federal Constitution to which the state and its people have alike assented.

This view of the amendment is confirmed in the history of its adoption found in 2 Watson on the Constitution, 1301 et seq. Any other view might lead to endless confusion in the manner of ratification of Federal amendments. The choice of means of ratification was wisely withheld from conflicting action in the several states. . . .

It follows that the court erred in holding that the state had authority to require the submission of the ratification to a referendum under the state Constitution, and its judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed.

## CHAPTER III

### THE FEDERAL SYSTEM

#### 13. REPUBLICAN GOVERNMENT

Among the constitutional guaranties to the states is that of a republican form of government. The exact meaning of that term has, however, never been made clear; but it was probably best defined by Madison, writing in defense of the Constitution during the campaign for its ratification. The courts have since, in several cases, held that certain political practices, such as the denial of suffrage to women or the use of the initiative and referendum, are not a denial of republican government, but have consistently declined to define the term more positively.

The question as to the meaning of the guaranty, and how it might be made effective, came to the Supreme Court as a result of "Dorr's Rebellion" in Rhode Island. That state had made no new constitution upon the declaration of independence, but continued to be governed under its colonial charter. The demand for a new state constitution became so strong, however, that in 1841 a convention was held, a new constitution was framed, submitted, and ratified by the people, and new state officers elected (with Thomas W. Dorr as governor)—but all without the authority of the existing charter government. There were thus two state governments in Rhode Island, each claiming to be the rightful authority. Dorr attempted to seize control by force, but his armed followers were dispersed and the "rebellion" suppressed. Later, in 1842, another constitutional convention was held under the authority of the charter government, and the instrument framed by it was likewise ratified by the people and became effective in 1843. Meanwhile, the turmoil of 1841-1842 resulted in actions being brought in the courts, and the effort to secure a judicial determination of the republican government guaranty was pressed before the Supreme Court.

##### a. Definition of Republican Government

[James Madison, in *The Federalist*, no. 39.]

What, then, are the distinctive characters of the republican form? Were an answer to this question to be sought, not by recurring to principles, but in the application of the term by political writers to the constitutions of different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised, in the most absolute manner, by a small body of hereditary nobles. Poland, which is a mix-

ture of aristocracy and of monarchy in their worst forms, has been dignified with the same appellation. The government of England, which has one republication branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed on the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions.

If we resort for a criterion to the different principles on which different forms of government are established, we may define a republic to be or at least may bestow that name on, a government which derives all its powers directly or indirectly from the great body of the people, and administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republicans and claim for their government the honorable title of republic. It is *sufficient* for such a government that the persons administering it be appointed either directly or indirectly, by the people; and that they hold their appointments by either of the tenures just specified; otherwise every government in the United States, as well as every other popular government that has been or can be well organized or well executed, would be degraded from the republican character.

#### b. Application of Federal Guaranty

[*Luther v. Borden* (1849), 7 Howard 1, 42-44; 12 L. Ed. 581, 599-600.]

Mr. Chief Justice Taney delivered the opinion of the court:

. . . The Constitution of the United States, as far as it has provided for an emergency of this kind, and authorized the general government to interfere in the domestic concerns of a State, has treated the subject as political in its nature, and placed the power in the hands of that department. . . .

Under this article of the Constitution [Art. IV, Sec. 4] it rests with Congress to decide what government is the established one in a State. For as the United States guarantee to each State a republican government, Congress must necessarily decide what government is established in the State before it can determine whether it is republican or not. And when the senators and representatives of a State are admitted into the councils of the Union, the authority of the government under which they are appointed, as well as its republican character, is recognized by the

proper constitutional authority. And its decision is binding on every other department of the government, and could not be questioned in a judicial tribunal. It is true that the contest in this case did not last long enough to bring the matter to this issue; and as no senators or representatives were elected under the authority of the government of which Mr. Dorr was the head, Congress was not called upon to decide the controversy. Yet the right to decide is placed there, and not in the courts.

So, too, as relates to the clause in the above mentioned article of the Constitution, providing for cases of domestic violence. It rested with Congress, too, to determine upon the means proper to be adopted to fulfill this guarantee. They might, if they had deemed it most advisable to do so, have placed it in the power of a court to decide when a contingency had happened which required the federal government to interfere. But Congress thought otherwise, and no doubt wisely; and by the Act of February 28, 1795, provided, that, "in case of an insurrection in any State against the government thereof it shall be lawful for the President of the United States, on application of the Legislature of such State or of the executive (when the Legislature cannot be convened), to call forth such number of the militia of any other State or States, as may be applied for, as he may judge sufficient to suppress such insurrection."

By this act, the power of deciding whether the exigency had arisen upon which the government of the United States is bound to interfere, is given to the President. He is to act under the application of the Legislature or of the executive, and consequently he must determine what body of men constitute the Legislature, and who is the governor, before he can act. The fact that both parties claim the right to the government cannot alter the case, for both cannot be entitled to it. If there is an armed conflict, like the one of which we are speaking, it is a case of domestic violence, and one of the parties must be in insurrection against the lawful government. And the President must, of necessity, decide which is the government, and which party is unlawfully arrayed against it, before he can perform the duty imposed upon him by the act of Congress.

After the President has acted and called out the militia, is a circuit court of the United States authorized to inquire whether his decision was right? Could the court, while the parties were actually contending in arms for the possession of the government call witnesses before it, and inquire which party represented a majority of the people? If it could, then it would become the duty of the court (provided it came to the conclusion that the President had decided incorrectly) to discharge those who were arrested or detained by the troops in the service of the United States or the government, which the President was endeavoring to main-



tain. If the judicial power extends so far, the guarantee contained in the Constitution of the United States is a guarantee of anarchy, and not of order. Yet if this right does not reside in the courts when the conflict is raging, if the judicial power is at that time bound to follow the decision of the political, it must be equally bound when the contest is over. It cannot, when peace is restored, punish as offenses and crimes the acts which it before recognized, and was bound to recognize, as lawful.

It is true that in this case the militia were not called out by the President. But upon the application of the governor under the charter government, the President recognized him as the executive power of the State, and took measures to call out the militia to support his authority if it should be found necessary for the general government to interfere; and it is admitted in the argument, that it was the knowledge of this decision that put an end to the armed opposition to the charter government, and prevented any further efforts to establish by force the proposed constitution. The interference of the President, therefore, by announcing his determination, was as effectual as if the militia had been assembled under his orders. And it should be equally authoritative. For certainly no court of the United States, with a knowledge of this decision, would have been justified in recognizing the opposing party as the lawful government; or in treating as wrong-doers or insurgents the officers of the government which the President had recognized, and was prepared to support by an armed force. In the case of foreign nations, the government acknowledged by the President is always recognized in the courts of justice. And this principle has been applied by the act of Congress to the sovereign States of the Union.

#### 14. FEDERAL SUPREMACY

A federal system of government, such as that in the United States, presupposes a division of powers between states and nation, each supreme within its own field. The doctrine of federal or national supremacy is also definitely incorporated into the system in the so-called "supreme law of the land clause," but the full meaning and effect of this doctrine upon the power of the states was not at first understood. The right of the states to interpret federal laws for themselves had been asserted on several occasions, notably in the Virginia and Kentucky Resolutions of 1799 and 1800. When this led to an attempt at actual nullification by South Carolina in 1832, President Jackson vigorously asserted and enforced the supremacy of the federal government. The classic judicial exposition of this doctrine of federal supremacy was, however, made by the Supreme Court in 1859, and it may be of some significance that the opinion was written by Chief Justice Taney, a staunch believer in the rights of the states.

[*Ableman v. Booth* (1859), 21 Howard 506, 514-526; 16 L. Ed. 169, 172-176.]

It will be seen, from the foregoing statement of facts, that a judge of the supreme court of the state of Wisconsin, in the first of these cases, claimed and exercised the right to supervise and annul the proceedings of a commissioner of the United States, and to discharge a prisoner, who had been committed by the commissioner for an offense against the laws of the government, and that this exercise of power by the judge was afterwards sanctioned and affirmed by the supreme court of the state.

In the second case the state court has gone a step farther, and claimed and exercised jurisdiction over the proceedings and judgment of a district court of the United States, and upon a summary and collateral proceeding, by habeas corpus, has set aside and annulled its judgment, and discharged a prisoner, who had been tried and found guilty of an offense against the laws of the United States, and sentenced to imprisonment by the district court.

And it further appears that the state court have not only claimed and exercised this jurisdiction, but have also determined that their decision is final and conclusive upon all the courts of the United States, and ordered their clerk to disregard and refuse obedience to the writ of error issued by this court, pursuant to the act of Congress of 1789, to bring here for examination and revision the judgment of the state court.

These propositions are new in the jurisprudence of the United States as well as of the states; and the supremacy of the state courts over the courts of the United States, in cases arising under the Constitution and laws of the United States, is now for the first time asserted and acted upon in the supreme court of a state.

The supremacy is not, indeed, set forth distinctly and broadly, in so many words, in the printed opinions of the judges. It is intermixed with elaborate discussions of different provisions in the fugitive slave law, and of the privileges and power of the writ of habeas corpus. But the paramount power of the state court lies at the foundation of these decisions; for their commentaries upon the provisions of that law, and upon the privileges and power of the writ of habeas corpus, were out of place, and their judicial action upon them without authority of law, unless they had the power to revise and control the proceedings in the criminal case of which they were speaking; and their judgments, releasing the prisoner, and disregarding the writ of error from this court, can rest upon no other foundation.

If the judicial power exercised in this instance has been reserved to the states, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the state in which the party happens to be impri-

soned; for, if the supreme court of Wisconsin possessed the power it has exercised in relation to offenses against the act of Congress in question, it necessarily follows that they must have the same judicial authority in relation to any other law of the United States; and, consequently, the supervising and controlling power would embrace the whole Criminal Code of the United States, and extend to offenses against our revenue laws, or any other law intended to guard the different departments of the general government from fraud or violence. And it would embrace all crimes, from the highest to the lowest; including felonies, which are punished with death, as well as misdemeanors, which are punished by imprisonment. And, moreover, if the power is possessed by the supreme court of the state of Wisconsin, it must belong equally to every other state in the Union, when the prisoner is within its territorial limits; and it is very certain that the state courts would not always agree in opinion, and it would often happen, that an act which was admitted to be an offense, and justly punished, in one state, would be regarded as innocent and indeed as praiseworthy, in another.

It would seem to be hardly necessary to do more than to state the result to which these decisions of the state courts must inevitably lead. This is, of itself, a sufficient and conclusive answer; for no one will suppose that a government which has now lasted nearly seventy years, enforcing its laws by its own tribunals, and preserving the union of the states, could have lasted a single year, or fulfilled the high trusts committed to it, if offenses against its laws could not have been punished without the consent of the state in which the culprit was found.

The judges of the supreme court of Wisconsin do not distinctly state from what source they suppose they have derived this judicial power. There can be no such thing as judicial authority, unless it is conferred by a government or sovereignty, and if the judges and courts of Wisconsin possess the jurisdiction they claim, they must derive it either from the United States or the state. It certainly has not been conferred on them by the United States; and it is equally clear it was not in the power of the state to confer it, even if it had attempted to do so; for no state can authorize one of its judges or courts to exercise judicial power, by habeas corpus or otherwise, within the jurisdiction of another and independent government. And although the state of Wisconsin is sovereign within its territorial limits to certain extent, yet that sovereignty is limited and restricted by the Constitution of the United States. And the powers of the general government, and of the state, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within

their respective spheres. And the sphere of action appropriated to the United States is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye. And the state of Wisconsin had no more power to authorize these proceedings of its judges and courts, than it would have had if the prisoner had been confined in Michigan, or in any other state of the Union, for an offense against the laws of the state in which he was imprisoned. . . .

Questions of this kind must always depend upon the Constitution and laws of the United States, and not of a state. The Constitution was not formed merely to guard the states against danger from foreign nations, but mainly to secure union and harmony at home; for if this object could be attained, there would be but little danger from abroad; and to accomplish this purpose, it was felt by the statesmen who framed the Constitution, and by the people who adopted it, that it was necessary that many of the rights of sovereignty which the states then possessed should be ceded to the general government; and that, in the sphere of action assigned to it, it should be supreme and strong enough to execute its own laws by its own tribunals, without interruption from a state or from state authorities. And it was evident that anything short of this would be inadequate to the main objects for which the government was established; and that local interests, local passions or prejudices, incited and fostered by individuals for sinister purposes, would lead to acts of aggression and injustice by one state upon the rights of another, which would ultimately terminate in violence and force, unless there was a common arbiter between them, armed with power enough to protect and guard the rights of all, by appropriate laws, to be carried into execution peacefully by its judicial tribunals. . . .

But the supremacy thus conferred on this government could not peacefully be maintained, unless it was clothed with judicial power, equally paramount in authority to carry it into execution; for if left to the courts of justice in the several states, conflicting decisions would unavoidably take place, and the local tribunals could hardly be expected to be always free from the local influences of which we have spoken. And the Constitution and laws and treaties of the United States, and the powers granted to the Federal government, would soon receive different interpretations in different states, and the government of the United States would soon become one thing in one state and another thing in another. It was essential, therefore, to its very existence as a government, that it should have the power of establishing courts of justice, altogether independent of state power, to carry into effect its own laws; and that a tribunal

should be established in which all cases which might arise under the Constitution and laws and treaties of the United States, whether in a state court or a court of the United States, should be finally and conclusively decided. Without such a tribunal, it is obvious that there would be no uniformity of judicial decision; and that the supremacy (which is but another name for independence), so carefully provided in the clause of the Constitution above referred to, could not possibly be maintained peacefully, unless it was associated with this paramount judicial authority. . . .

Nor is there anything in this supremacy of the general government, or the jurisdiction of its judicial tribunals, to awaken the jealousy or offend the natural and just pride of state sovereignty. Neither this government, nor the powers of which we are speaking, were forced upon the states. The Constitution of the United States, with all the powers conferred by it on the general government, and surrendered by the state, was the voluntary act of the people of the several states, deliberately done, for their own protection and safety against injustice from one another. And their anxiety to preserve it in full force, in all its powers, and to guard against resistance to or evasion of its authority, on the part of a state, is proved by the clause which requires that the members of the state legislatures, and all executive and judicial officers of the several states (as well as those of the general government), shall be bound, by oath or affirmation, to support this Constitution. This is the last and closing clause of the Constitution, and inserted when the whole frame of government, with the powers hereinbefore specified, had been adopted by the convention; and it was in that form, and with these powers, that the Constitution was submitted to the people of the several states, for their consideration and decision.

Now, it certainly can be no humiliation to the citizen of a republic to yield a ready obedience to the laws as administered by the constituted authorities. On the contrary, it is among his first and highest duties as a citizen, because free government cannot exist without it. Nor can it be inconsistent with the dignity of a sovereign state, to observe faithfully, and in the spirit of sincerity and truth, the compact into which it voluntarily entered when it became a state of this Union. On the contrary the highest honor of sovereignty is untarnished faith. And certainly no faith could be more deliberately and solemnly pledged than that which every state has plighted to the other states to support the Constitution as it is, in all its provisions, until they shall be altered in the manner which the Constitution itself prescribes. In the emphatic language of the pledge required, it is to support this Constitution. And no power is

more clearly conferred by the Constitution and laws of the United States, than the power of this court to decide, ultimately and finally, all cases arising under such Constitution and laws; and for that purpose to bring here for revision, by writ of error, the judgment of a state court, where such questions have arisen, and the right claimed under them denied by the highest judicial tribunal in the state.

## 15. IMPLIED POWERS

The constitutional principle that the federal government and its organs have only delegated powers was always well understood. The so-called "necessary and proper" or "elastic clause," however, evoked considerable discussion as to the extent to which powers other than those expressly enumerated might be exercised by these federal organs. Hamilton became the leader of those who insisted on a liberal interpretation of that clause, and who were therefore called the "broad" or "loose constructionists." Jefferson and his followers believed, on the other hand, in a strict interpretation of the clause in question, although they did not deny absolutely the existence of implied powers. They were therefore called the "strict" or "narrow constructionists." This division of opinion became evident in connection with several of the governmental policies, but with none more sharply than the creation of a United States Bank. Such a bank was established in 1791, in spite of the bitter opposition of the Jeffersonians, and existed until 1811, when its charter expired. A Second United States Bank was chartered in 1816, and the state of Maryland imposed a heavy tax upon the notes issued by its Baltimore branch. The refusal of the branch bank to pay this tax brought before the Supreme Court the question of the power of the federal government to establish such a bank as well as the state's power to tax federal instrumentalities. The resulting exposition of the doctrine of implied powers is perhaps the most important of Chief Justice Marshall's opinions, since it formed the basis for the notable expansion of federal power and strengthened the Union accordingly.

[*McCulloch v. Maryland* (1819), 4 Wheat. 316, 400, 404-424; 4 L. Ed. 579, 600-606.]

In the case now to be determined, the defendant, a sovereign state, denies the obligation of a law enacted by the legislature of the Union, and the plaintiff, on his part, contests the validity of an act which has been passed by the legislature of that state. The Constitution of our country, in its most interesting and vital parts, is to be considered; the conflicting powers of the government of the Union and of its members, as marked in that Constitution, are to be discussed; and an opinion given, which may essentially influence the great operations of the government. No tribunal can approach such a question without a deep sense of its importance, and of the awful responsibility involved in its decision. But it must be decided peacefully, or remain a source of hostile legislation, perhaps of hostility of a still more serious nature; and if it is to be so de-



cided, by this tribunal alone can the decision be made. On the Supreme Court of the United States has the Constitution of our country devolved this important duty.

The first question made in the cause is, has Congress power to incorporate a bank? . . .

The government of the Union, then (whatever may be the influence of this fact on the case), is emphatically and truly a government of the people. In form and in substance it emanates from them, its powers are granted by them, and are to be exercised directly on them, and for their benefit.

This government is acknowledged by all to be one of enumerated powers. The principle, that it can exercise only the powers granted to it, would seem too apparent to have required to be enforced by all those arguments which its enlightened friends, while it was depending before the people, found it necessary to urge. That principle is now universally admitted. But the question respecting the extent of the powers actually granted, is perpetually arising, and will probably continue to arise, as long as our system shall exist. . . .

Among the enumerated powers, we do not find that of establishing a bank or creating a corporation. But there is no phrase in the instrument which, like the Articles of Confederation, excludes incidental or implied powers; and which requires that everything granted shall be expressly and minutely described. Even the Tenth Amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word "expressly," and declares only that the powers "not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people"; thus leaving the question, whether the particular power which may become the subject of contest, has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment, had experienced the embarrassments resulting from the insertion of this word in the Articles of Confederation, and probably omitted it to avoid those embarrassments. A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves. That this

idea was entertained by the framers of the American Constitution, is not only to be inferred from the nature of the instrument, but from the language. Why else were some of the limitations, found in the ninth section of the first article, introduced? It is also, in some degree, warranted by their having omitted to use any restrictive term which might prevent its receiving a fair and just interpretation. In considering this question, then, we must never forget, that it is a constitution we are expounding.

Although, among the enumerated powers of government, we do not find the word "bank," or "incorporation," we find the great powers to lay and collect taxes; to borrow money; to regulate commerce; to declare and conduct war; and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation, are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance, merely because they are inferior. Such an idea can never be advanced. But it may, with great reason, be contended, that a government, intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. It can never be their interest, and cannot be presumed to have been their intention, to clog and embarrass its execution by withholding the most appropriate means. Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require, that the treasure raised in the north should be transported to the south, that raised in the east conveyed to the west, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? Can we adopt that construction (unless the words imperiously require it) which would impute to the framers of that instrument, when granting these powers for the public good, the intention of impeding their exercise by withholding a choice of means? If, indeed, such be the mandate of the Constitution, we have only to obey; but that instrument does not profess to enumerate the means by which the powers it confers may be executed; nor does it prohibit the creation of a corporation, if the existence of such a being be essential to the beneficial exercise of those powers. It is, then, the subject of fair inquiry, how far such means may be employed.

It is not denied, that the powers given to the government imply the ordinary means of execution. That, for example, of raising revenue and applying it to national purposes, is admitted to imply the power of conveying money from place to place, as the exigencies of the nation may require, and of employing the usual means of conveyance. But it is denied that the government has its choice of means; or, that it may employ the most convenient means, if, to employ them, it be necessary to erect a corporation.

. . . The power of creating a corporation, though appertaining to sovereignty, is not, like the power of making war, or levying taxes, or of regulating commerce, a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. No sufficient reason is, therefore, perceived, why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.

But the Constitution of the United States has not left the right of Congress to employ the necessary means, for the execution of the powers conferred on the government, to general reasoning. To its enumeration of powers is added that of making "all laws which shall be necessary and proper, for carrying into execution the foregoing powers, and all other powers vested by this Constitution, in the government of the United States, or in any department thereof."

The counsel for the State of Maryland have urged various arguments, to prove that this clause, though in terms a grant of power, is not so in effect; but is really restrictive of the general right, which might otherwise be implied, of selecting means for executing the enumerated powers.

In support of this proposition, they have found it necessary to contend, that this clause was inserted for the purpose of conferring on Congress the power of making laws. That, without it, doubts might be entertained, whether Congress could exercise its powers in the form of legislation.

But could this be the object for which it was inserted? . . . That a legislature, endowed with legislative powers, can legislate, is a proposition too self-evident to have been questioned.

But the argument on which most reliance is placed, is drawn from the peculiar language of this clause. Congress is not empowered by it to make all laws, which may have relation to the powers conferred on the government, but such only as may be "necessary and proper" for carrying them into execution. The word "necessary" is considered as controlling the whole sentence, and as limiting the right to pass laws for the execution of the granted powers, to such as are indispensable, and without which the power would be nugatory. That it includes the choice of means, and leaves to Congress, in each case, that only which is most direct and simple.

Is it true, that this is the sense in which the word "necessary" is always used? Does it always import an absolute physical necessity, so strong, that one thing, to which another may be termed necessary, cannot exist without that other? We think it does not. If reference be had to its use, in the common affairs of the world, or in approved authors, we find that it frequently imports no more than that one thing is convenient, or useful, or essential to another. To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end, and not as being confined to those single means, without which the end would be entirely unattainable. Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which, taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction, that many words which import something excessive, should be understood in a more mitigated sense—in that sense which common usage justifies. The word "necessary" is of this description. It has not a fixed character peculiar to itself. It admits of all degrees of comparison; and is often connected with other words, which increase or diminish the impression the mind receives of the urgency it imports. A thing may be necessary, very necessary, absolutely or indispensably necessary. To no mind would the same idea be conveyed, by these several phrases. . . . This word, then, like others, is used in various senses; and, in its construction, the subject, the context, the intention of the person using them, are all to be taken into view. . . .

The result of the most careful and attentive consideration bestowed upon this clause is, that if it does not enlarge, it cannot be construed to

restrain the powers of Congress, or to impair the right of the legislature to exercise its best judgment in the selection of measures to carry into execution the constitutional powers of the government. If no other motive for its insertion can be suggested, a sufficient one is found in the desire to remove all doubts respecting the right to legislate on that vast mass of incidental powers which must be involved in the Constitution, if that instrument be not a splendid bauble.

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the Constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the Constitution, are constitutional. . . .

If a corporation may be employed indiscriminately with other means to carry into execution the powers of the government, no particular reason can be assigned for excluding the use of a bank, if required for its fiscal operations. To use one, must be within the discretion of Congress, if it be an appropriate mode of executing the powers of government. That it is a convenient, a useful, and essential instrument in the prosecution of its fiscal operations, is not now a subject of controversy. All those who have been concerned in the administration of our finances, have concurred in representing its importance and necessity; and so strongly have they been felt, that statesmen of the first class, whose previous opinions against it had been confirmed by every circumstance which can fix the human judgment, have yielded those opinions to the exigencies of the nation. . . .

After the most deliberate consideration, it is the unanimous and decided opinion of this court, that the act to incorporate the Bank of the United States is a law made in pursuance of the Constitution, and is a part of the supreme law of the land. . . .

## 16. DEFINITION OF CITIZENSHIP

The original Constitution of the United States did not contain a definition of citizenship. It was the usual view, however, that the United States followed the English rule of *jus soli*, whereby citizenship is determined by the place of birth. Some exceptions to this rule, however, were recognized. One such exception was established by the Supreme Court in the Dred Scott Case, decided in 1857, wherein it was held that a native born negro is not an American citizen. The first sentence

of the Fourteenth Amendment was intended not only to supply a constitutional definition of citizenship, but also to reverse or recall the Dred Scott ruling. The meaning of this definition in the Fourteenth Amendment was authoritatively construed by the Supreme Court in a case involving one Wong Kim Ark, who was born in San Francisco in 1873 of alien Chinese parents.

[*United States v. Wong Kim Ark* (1898), 169 U. S. 649-732; 42 L. Ed. 890-920.]

. . . The question presented by the record is whether a child born in the United States, of parents of Chinese descent, who at the time of his birth are subjects of the emperor of China, but have a permanent domicile and residence in the United States, and are there carrying on business, and are not employed in diplomatic or official capacity under the emperor of China, becomes at the time of his birth a citizen of the United States, by virtue of the first clause of the Fourteenth Amendment of the Constitution: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

The Constitution of the United States, as originally adopted, uses the words "citizen of the United States" and "natural-born citizen of the United States." By the original Constitution, every Representative in Congress is required to have been "seven years a citizen of the United States," and every Senator to have been "nine years a citizen of the United States"; and "no person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President."

. . . The Constitution nowhere defines the meaning of these words, either by way of inclusion or of exclusion, except in so far as this is done by the affirmative declaration that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States." In this, as in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution. . . .

. . . The fundamental principle of the common law with regard to English nationality was birth within the allegiance—also called "liegalty," "obedience," "faith," or "power"—of the king. The principle embraced all persons born within the king's allegiance, and subject to his protection.

. . . The first section of the Fourteenth Amendment of the Constitution begins with the words, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." As appears



upon the face of the amendment, as well as from the history of the times, this was not intended to impose any new restrictions upon citizenship, or to prevent any persons from becoming citizens by the act of birth within the United States, who would thereby have become citizens according to the law existing before its adoption. It is declaratory in form, and enabling and extending in effect. Its main purpose doubtless was, as has been often recognized by this court, to establish the citizenship of free negroes, which had been denied in the opinion delivered by Chief Justice Taney in *Dred Scott v. Sandford*, 19 Howard 393 (1857), and to put it beyond doubt that all blacks, as well as whites, born or naturalized within the jurisdiction of the United States, are citizens of the United States. . . . But the opening words, "All persons born," are general, not to say universal, restricted only by place and jurisdiction, and not by color or race, as was clearly recognized in all the opinions delivered in the *Slaughterhouse Cases*. . . .

The real object of the Fourteenth Amendment of the Constitution, in qualifying the words "all persons born in the United States" by the addition "and subject to the jurisdiction thereof," would appear to have been to exclude, by the fewest and fittest words (besides children of members of the Indian tribes, standing in a peculiar relation to the national government, unknown to the common law), the two classes of cases,—children born of alien enemies in hostile occupation, and children of diplomatic representatives of a foreign state,—both of which, as has already been shown, by the law of England and by our own law, from the time of the first settlement of the English colonies in America had been recognized exceptions to the fundamental rule of citizenship by birth within the country. . . .

The foregoing considerations and authorities irresistibly lead us to these conclusions: The Fourteenth Amendment affirms the ancient and fundamental rule of citizenship by birth within the territory, in the allegiance and under the protection of the country, including all children here born of resident aliens, with the exceptions or qualifications (as old as the rule itself) of children of foreign sovereigns or their ministers, or born on foreign public ships, or of enemies within and during a hostile occupation of part of our territory, and with the single additional exception of children of members of the Indian tribes owing direct allegiance to their several tribes. The amendment, in clear words and in manifest intent, includes the children born within the territory of the United States of all other persons, of whatever race or color, domiciled within the United States. Every citizen or subject of another country, while domiciled here, is within the allegiance and the protection, and consequently subject to the jurisdiction, of the United States.

. . . It is true that Chinese persons born in China cannot be naturalized, like other aliens, by proceedings under the naturalization laws. But this is for want of any statute or treaty authorizing or permitting such naturalization, as will appear by tracing the history of the statutes enacted by Congress, as well as treaties made by the President and Senate, must yield to the paramount and supreme law of the Constitution. . . .

[Chief Justice Fuller and Justice Harlan dissented; Justice McKenna took no part in the decision.]

## 17. APPLICATION OF THE BILL OF RIGHTS

Again and again the suggestion is made that certain acts of state or local authorities are depriving persons of rights guaranteed to them by the national Constitution, and particularly by that part of the Constitution known as the Bill of Rights. The Supreme Court quite early in our history made clear the actual application of the Bill of Rights as a safeguard of the individual against governmental action. The case arose as the result of action by the city of Baltimore in diverting the flow of certain streams in such manner as to destroy the usefulness of a valuable wharf owned by the firm Craig & Barron. No compensation was given for this destruction of property, and the owners brought suit to recover damages, pleading the Fifth Amendment as requiring such compensation.

[*Barron v. Baltimore* (1833), 7 Peters 243, 247-251; 8 L. Ed. 672, 674-675.]

Mr. Chief Justice Marshall delivered the opinion of the court:

The judgment brought up by this writ of error having been rendered by the court of a State, this tribunal can exercise no jurisdiction over it unless it be shown to come within the provisions of the twenty-fifth section of the Judicial Act.

The plaintiff in error contends that it comes within that clause in the fifth amendment to the Constitution which inhibits the taking of private property for public use without just compensation. He insists that this amendment, being in favor of the liberty of the citizen, ought to be so construed as to restrain the legislative power of a State, as well as that of the United States. If this proposition be untrue, the court can take no jurisdiction of the cause.

The question thus presented is, we think, of great importance but not of much difficulty.

The Constitution was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment

dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation, and best calculated to promote their interests. The powers they conferred on this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and we think, necessarily applicable to the government created by the instrument. They are limitations of power granted in the instrument itself; not of distinct governments, framed by different persons and for different purposes.

If these propositions be correct, the fifth amendment must be understood as restraining the power of the general government, not as applicable to the States. In their several constitutions they have imposed such restrictions on their respective governments as their own wisdom suggested; such as they deemed most proper for themselves. It is a subject on which they judge exclusively, and with which others interfere no farther than they are supposed to have a common interest.

The counsel for the plaintiff in error insists that the Constitution was intended to secure the people of the several States against the undue exercise of power by their respective State governments; as well as against that which might be attempted by their general government. In support of this argument he relies on the inhibitions contained in the tenth section of the first article.

We think that section affords a strong if not a conclusive argument in support of the opinion already indicated by the court.

The preceding section contains restrictions which are obviously intended for the exclusive purpose of restraining the exercise of power by the departments of the general government. Some of them use language applicable only to Congress, others are expressed in general terms. The third clause, for example, declares that "no bill of attainder or ex post facto law shall be passed." No language can be more general; yet the demonstration is complete that it applies solely to the government of the United States. In addition to the general arguments furnished by the instrument itself, some of which have been already suggested, the succeeding section, the avowed purpose of which is to restrain State legislation, contains in terms the very prohibition. It declares that "no State shall pass any bill of attainder or ex post facto law." This provision, then, of the ninth section, however comprehensive its language, contains no restriction on State legislation.

The ninth section having enumerated, in the nature of a bill of rights, the limitations intended to be imposed on the powers of the general government, the tenth proceeds to enumerate those which were to operate on

the State legislatures. These restrictions are brought together in the same section, and are by express words applied to the States. "No State shall enter into any treaty," etc. Perceiving that in a Constitution framed by the people of the United States for the government of all, no limitation of the action of government on the people would apply to the State government unless expressed in terms; the restrictions contained in the tenth section are in direct words so applied to the States.

It is worthy of remark, too, that these inhibitions generally restrain State legislation on subjects intrusted to the general government, or in which the people of all the States feel an interest.

A State is forbidden to enter into any treaty, alliance or confederation. If these compacts are with foreign nations, they interfere with the treaty-making power which is conferred entirely on the general government; if with each other, for political purposes, they can scarcely fail to interfere with the general purpose and intent of the Constitution. To grant letters of marque and reprisal would lead directly to war, the power of declaring which is expressly given to Congress. To coin money is also the exercise of a power conferred on Congress. It would be tedious to recapitulate the several limitations on the powers of the States which are contained in this section. They will be found, generally, to restrain State legislation on subjects intrusted to the government of the Union, in which the citizens of all the States are interested. In these alone were the whole people concerned. The question of their application to States is not left to construction. It is averred in positive words.

If the original Constitution, in the ninth and tenth sections of the first article, draws this plain and marked line of discrimination between the limitations it imposes on the powers of the general government and on those of the States; if in every inhibition intended to act on State power words are employed which directly express that intent, some strong reason must be assigned for departing from this safe and judicious course in framing the amendments, before that departure can be assumed.

We search in vain for that reason.

Had the people of the several States, or any of them, required changes in their constitutions; had they required additional safeguards to liberty from the apprehended encroachments of their particular governments, the remedy was in their own hands, and would have been applied by themselves. A convention would have been assembled by the discontented State, and the required improvements would have been made by itself. The unwieldy and cumbrous machinery of procuring a recommendation from two-thirds of Congress and the assent of three-fourths of their sister States, could never have occurred to any human being as a mode of

doing that which might be effected by the State itself. Had the framers of these amendments intended them to be limitations on the powers of the State governments they would have imitated the framers of the original Constitution, and have expressed that intention. Had Congress engaged in the extraordinary occupation of improving the constitutions of the several States by affording the people additional protection from the exercise of power by their own governments in matters which concerned themselves alone, they would have declared this purpose in plain and intelligible language.

But it is universally understood, it is a part of the history of the day, that the great revolution which established the Constitution of the United States was not effected without immense opposition. Serious fears were extensively entertained that those powers which the patriot statesmen who then watched over the interests of our country, deemed essential to union, and to the attainment of those invaluable objects for which union was sought, might be exercised in a manner dangerous to liberty. In almost every convention by which the Constitution was adopted, amendments to guard against the abuse of power were recommended. These amendments demanded security against the apprehended encroachments of the general government—not against those of the local governments.

In compliance with a sentiment thus generally expressed, to quiet fears thus extensively entertained, amendments were proposed by the required majority in Congress, and adopted by the States. These amendments contain no expression indicating an intention to apply them to the State governments. This court cannot so apply them.

We are of opinion that the provision in the fifth amendment to the Constitution, declaring that private property shall not be taken for public use without just compensation, is intended solely as a limitation on the exercise of power by the government of the United States, and is not applicable to the legislation of the States. We are therefore of opinion that there is no repugnancy between the several acts of the General Assembly of Maryland, given in evidence by the defendants at the trial of this cause in the court of that State, and the Constitution of the United States.

This court, therefore, has no jurisdiction of the cause, and it is dismissed.

## 18. FREEDOM OF SPEECH AND PRESS

Among the most precious rights guaranteed by the Constitution are the right to speak and write freely and publicly, implying especially the right to expose what may be considered unsound conditions and to criticize actions of government

officials. It has always been assumed, however, that even these rights must be exercised with due regard for the truth and the public safety, and that there are no absolute rights under all conditions. In actual practice, various limitations have been imposed by statute and by police and other officials, which, to the extent that they are the result of state or local action, are not clearly violative of the federal Bill of Rights and over which the federal courts have therefore hesitated to assume jurisdiction. During recent years the federal courts seem to have become more concerned about these rights and have found means of enforcing them against state and local infringement, in spite of the rule governing the application of the Bill of Rights. Thus, the Supreme Court in 1931 denied the constitutionality of a Minnesota "gag law", which permitted newspapers to be enjoined and suppressed for printing matter that was scandalous, malicious, defamatory, or obscene, this ruling being based, however, not on the provisions of the Bill of Rights but on the due process clause of the Fourteenth Amendment. In 1939 the Supreme Court, acting again under the due process clause and also under the privileges and immunities provisions, severely condemned Mayor Hague of Jersey City for arbitrarily preventing labor organizers and others from speaking in that city, and denied the constitutionality of an ordinance enacted to give city officers complete discretionary authority to issue permits for public meetings.

#### a. Minnesota Press Case

[*Near v. Minnesota* (1931), 283 U. S. 697; 75 L. Ed. 1357.]

Mr. Chief Justice Hughes delivered the opinion of the Court. . . .

This statute, for the suppression as a public nuisance of a newspaper or periodical, is unusual, if not unique, and raises questions of grave importance transcending the local interests involved in the particular action. It is no longer open to doubt that the liberty of the press, and of speech, is within the liberty safeguarded by the due process clause of the Fourteenth Amendment from invasion by state action. It was found impossible to conclude that this essential personal liberty of the citizen was left unprotected by the general guaranty of fundamental rights of person and property. *Gitlow v. New York*, 268 U. S. 652, 666; *Whitney v. California*, 274 U. S. 357, 362, 373; *Fiske v. Kansas*, 274 U. S. 380, 382; *Stromberg v. California*, [283 U. S. 359]. In maintaining this guaranty, the authority of the State to enact laws to promote the health, safety, morals, and general welfare of its people is necessarily admitted. The limits of this sovereign power must always be determined with appropriate regard to the particular subject of its exercise. Thus, while recognizing the broad discretion of the legislature in fixing rates to be charged by those undertaking a public service, this Court has decided that the owner cannot constitutionally be deprived of his right to a fair return, because that is deemed to be of the essence of ownership. *Railroad Commission Cases*, 116 U. S. 307, 331, *Northern Pacific Railway Co. v. North*



*Dakota*, 236 U. S. 585, 596. So, while liberty of contract is not an absolute right, and the wide field of activity in the making of contracts is subject to legislative supervision (*Frisbie v. United States*, 157 U. S. 161, 165), this Court has held that the power of the State stops short of interference with what are deemed to be certain indispensable requirements of the liberty assured, notably with respect to the fixing of prices and wages. *Tyson v. Banton*, 273 U. S. 418; *Ribnik v. McBride*, 277 U. S. 350; *Adkins v. Children's Hospital*, 261 U. S. 525, 560, 561. Liberty of speech, and of the press, is also not an absolute right, and the State may punish its abuse. *Whitney v. California*, *supra*; *Stromberg v. California*, *supra*. Liberty in each of its phases, has its history and connotation and, in the present instance, the inquiry is as to the historic conception of the liberty of the press and whether the statute under review violates the essential attributes of that liberty. . . .

If we cut through mere details of procedure the operation and effect of the statute in substance is that public authorities may bring the owner or publisher of a newspaper or periodical before a judge upon a charge of conducting a business of publishing scandalous and defamatory matter—in particular that the matter consists of charges against public officers of official dereliction—and unless the owner or publisher is able and disposed to bring competent evidence to satisfy the judge that the charges are true and are published with good motives and for justifiable ends, his newspaper or periodical is suppressed, and further publication is made punishable as a contempt. This is the essence of censorship.

The question is whether a statute authorizing proceedings in restraint of publication is consistent with the conception of the liberty of the press as historically conceived and guaranteed. In determining the extent of the constitutional protection it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication. The struggle in England, directed against the legislative power of the licenser, resulted in renunciation of the censorship of the press. The liberty deemed to be established was thus described by Blackstone: "The liberty of the press is indeed essential to the nature of a free state, but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every free-man has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal he must take the consequence of his own temerity." . . .

The criticism upon Blackstone's statement has not been because immunity from previous restraint upon publication has not been regarded

as deserving of special emphasis, but chiefly because that immunity cannot be deemed to exhaust the conception of the liberty guaranteed by state and federal constitutions. The point of criticism has been "that the mere exemption from previous restraints cannot be all that is secured by the constitutional provisions"; and that "the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword, if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications." 2 Cooley, Const. Lim., 8th ed., p. 885. But it is recognized that punishment for the abuse of the liberty accorded to the press is essential to the protection of the public, and that the common law rules that subject the libeler to responsibility for the public offense, as well as for the private injury, are not abolished by the protection extended in our constitutions. *Id.* pp. 883, 884. The law of criminal libel rests upon that secure foundation. There is also the conceded authority of courts to punish for contempt when publications directly tend to prevent the proper discharge of judicial functions. *Patterson v. Colorado, supra*; *Toledo Newspaper Company v. United States*, 247 U. S. 402, 419. In the present case we have no occasion to inquire as to the permissible scope of subsequent punishment. For whatever wrong the appellant has committed or may commit, by his publications, the State appropriately affords both public and private redress by its libel laws. As has been noted, the statute in question does not deal with punishments; it provides for no punishment, except in case of contempt for violation of the court's order, but for suppression and injunction, that is, for restraint upon publication.

The objection has also been made that the principle as to immunity from previous restraint is stated too broadly, if every such restraint is deemed to be prohibited. That is undoubtedly true; the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases. "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right." *Schenck v. United States*, 249 U. S. 47, 52. No one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops. On similar grounds, the primary requirements of decency may be enforced against obscene publications. The security of the community life may be protected against incitements to acts of violence and the overthrow by force of orderly government. The constitutional guaranty of free speech does not "protect a man from

an injunction against uttering words that may have all the effect of force. *Gompers v. Buck Stove and Range Co.*, 221 U. S. 418, 439." *Schenck v. United States*, *supra*. . . .

The exceptional nature of its limitations places in a strong light the general conception that liberty of the press, historically considered and taken up by the Federal Constitution, has meant, principally although not exclusively, immunity from previous restraints or censorship. The conception of the liberty of the press in this country had broadened with the exigencies of the colonial period and with the efforts to secure freedom from oppressive administration. That liberty was especially cherished for the immunity it afforded from previous restraint of the publication of censure of public officers and charges of official misconduct. As was said by Chief Justice Parker, in *Commonwealth v. Blanding*, 3 Pick. 304, 313, with respect to the constitution of Massachusetts: "Besides, it is well understood, and received as a commentary on this provision for the liberty of the press, that it was intended to prevent all such *previous restraints* upon publications as had been practiced by other governments, and in early times here, to stifle the efforts of patriots towards enlightening their fellow subjects upon their rights and the duties of rulers. The liberty of the press was to be unrestrained, but he who used it was to be responsible in case of its abuse." In the letter sent by the Continental Congress [Oct. 26, 1774] to the inhabitants of Quebec, referring to the "five great rights," it was said: "The last right we shall mention regards the freedom of the press. The importance of this consists, besides the advancement of truth, science, morality, and arts in general, in its diffusion of liberal sentiment on the administration of Government, its ready communication of thoughts between subjects, and its consequential promotion of union among them, whereby oppressive officers are shamed or intimidated, into more honourable and just modes of conducting affairs." Madison, who was the leading spirit in the preparation of the First Amendment of the Federal Constitution, thus described the practice and sentiment which led to the guaranties of liberty of the press in state constitutions:

"In every State, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men of every description which has not been confined to the strict limits of the common law. On this footing the freedom of the press has stood; on this footing it yet stands. . . . Some degree of abuse is inseparable from the proper use of everything, and in no instance is this more true than in that of the press. It has accordingly been decided by the practice of the States, that it is better to leave a few of its noxious branches to their luxuriant

growth than, by pruning them away, to injure the vigor of those yielding the proper fruits. And can the wisdom of this policy be doubted by any who reflect that to the press alone, chequered as it is with abuses, the world is indebted for all the triumphs which have been gained by reason and humanity over error and oppression; who reflect that to the same beneficent source the United States owe much of the lights which conducted them to the ranks of a free and independent nation, and which have improved their political system into a shape so auspicious of their happiness? Had 'Sedition Acts,' forbidding every publication that might bring the constituted agents into contempt or disrepute, or that might excite the hatred of the people against the authors of unjust or pernicious measures, been uniformly enforced against the press, might not the United States have been languishing at this day under the infirmities of a sickly Confederation? Might they not, possibly, be miserable colonies, groaning under a foreign yoke?"

The fact that for approximately one hundred and fifty years there has been almost an entire absence of attempts to impose previous restraints upon publications relating to the malfeasance of public officers is significant of the deep-seated conviction that such restraints would violate constitutional right. Public officers, whose character and conduct remain open to debate and free discussion in the press, find their remedies for false accusations in actions under libel laws providing for redress and punishment, and not in proceedings to restrain the publication of newspapers and periodicals. The general principle that the constitutional guaranty of the liberty of the press gives immunity from previous restraints has been approved in many decisions under the provisions of state constitutions.

The importance of this immunity has not lessened. While reckless assaults upon public men and efforts to bring obloquy upon those who are endeavoring faithfully to discharge official duties, exert a baleful influence and deserve the severest condemnation in public opinion, it cannot be said that this abuse is greater, and it is believed to be less, than that which characterized the period in which our institutions took shape. Meanwhile, the administration of government has become more complex, the opportunities for malfeasance and corruption have multiplied, crime has grown to most serious proportions, and the danger of its protection by unfaithful officials and of the impairment of the fundamental security of life and property by criminal alliances and official neglect, emphasize the primary need of a vigilant and courageous press, especially in great cities. The fact that the liberty of the press may be abused by miscreant purveyors of scandal does not make any the less

necessary the immunity of the press from previous restraint in dealing with official misconduct. Subsequent punishment for such abuses as may exist is the appropriate remedy, consistent with constitutional privilege.

In attempted justification of the statute, it is said that it deals not with publication *per se*, but with the "business" of publishing defamation. If, however, the publisher has a constitutional right to publish, without previous restraint, an edition of his newspaper charging official derelictions, it cannot be denied that he may publish subsequent editions for the same purpose. He does not lose his right by exercising it. If his right exists, it may be exercised in publishing nine editions, as in this case, as well as in one edition. If previous restraint is permissible, it may be imposed at once; indeed, the wrong may be as serious in one publication as in several. Characterizing the publication as a business, and the business as a nuisance, does not permit an invasion of the constitutional immunity against restraint. Similarly, it does not matter that the newspaper or periodical is found to be "largely" or "chiefly" devoted to the publication of such derelictions. If the publisher has a right, without previous restraint, to publish them, his right cannot be deemed to be dependent upon his publishing something else, more or less, with the matter to which objection is made.

Nor can it be said that the constitutional freedom from previous restraint is lost because charges are made of derelictions which constitute crimes. With the multiplying provisions of penal codes, and of municipal charters and ordinances carrying penal sanctions, the conduct of public officers is very largely within the purview of criminal statutes. The freedom of the press from previous restraint has never been regarded as limited to such animadversions as lay outside the range of penal enactments. Historically, there is no such limitation; it is inconsistent with the reason which underlies the privilege, as the privilege so limited would be of slight value for the purposes for which it came to be established.

The statute in question cannot be justified by reason of the fact that the publisher is permitted to show, before injunction issues, that the matter published is true and is published with good motives and for justifiable ends. If such a statute, authorizing suppression and injunction on such a basis, is constitutionally valid, it would be equally permissible for the legislature to provide that at any time the publisher of any newspaper could be brought before a court, or even an administrative officer (as the constitutional protection may not be regarded as resting on mere procedural details), and required to produce proof of the

truth of his publication, or of what he intended to publish, and of his motives, or stand enjoined. If this can be done, the legislature may provide machinery for determining in the complete exercise of its discretion what are justifiable ends and restrain publication accordingly. And it would be but a step to a complete system of censorship. The recognition of authority to impose previous restraint upon publication in order to protect the community against the circulation of charges of misconduct, and especially of official misconduct, necessarily would carry with it the admission of the authority of the censor against which the constitutional barrier was erected. The preliminary freedom, by virtue of the very reason for its existence, does not depend, as this Court has said, on proof of truth. *Patterson v. Colorado, supra*.

Equally unavailing is the insistence that the statute is designed to prevent the circulation of scandal which tends to disturb the public peace and to provoke assaults and the commission of crime. Charges of reprehensible conduct, and in particular of official malfeasance, unquestionably create a public scandal, but the theory of the constitutional guaranty is that more serious public evil would be caused by authority to prevent publication. "To prohibit the intent to excite those unfavorable sentiments against those who administer the Government is equivalent to a prohibition of the actual excitement of them; and to prohibit the actual excitement of them is equivalent to a prohibition of discussions having that tendency and effect; which again is equivalent to a protection of those who administer the Government if they should at any time deserve the contempt or hatred of the people against being exposed to it by free animadversions on their characters and conduct." There is nothing new in the fact that charges of reprehensible conduct may create resentment and the disposition to resort to violent means of redress, but this well-understood tendency did not alter the determination to protect the press against censorship and restraint upon publication. As was said in *New Yorker Staats Zeitung v. Nolan*, 89 N. J. Eq. 387, 388, 105 Atl. 72: "If the township may prevent the circulation of a newspaper for no reason other than that some of its inhabitants may violently disagree with it, and resent its circulation by resorting to physical violence, there is no limit to what may be prohibited." The danger of violent reactions becomes greater with effective organization of defiant groups resenting exposure, and if this consideration warranted legislative interference with the initial freedom of publication, the constitutional protection would be reduced to a mere form of words.

For these reasons we hold the statute, so far as it authorized the proceedings in this action under clause (b) of section one, to be an



infringement of the liberty of the press guaranteed by the Fourteenth Amendment. We should add that this decision rests upon the operation and effect of the statute, without regard to the question of the truth of the charges contained in the particular periodical. The fact that the public officers named in this case, and those associated with the charges of official dereliction, may be deemed to be impeccable, cannot affect the conclusion that the statute imposes an unconstitutional restraint upon publication. *Judgment reversed.*

[Justices Holmes, Brandeis, Stone, and Roberts concurred in this opinion; Justices Butler, Van Devanter, McReynolds, and Sutherland dissented.]

### b. Hague Case

[*Hague v. Committee for Industrial Organization* (1939), 307 U. S. 496-533.]

Mr. Justice Roberts delivered an opinion in which Mr. Justice Black concurred. . . .\*

The bill alleges that acting under a city ordinance forbidding the leasing of any hall, without a permit from the Chief of Police, for a public meeting at which a speaker shall advocate obstruction of the Government of the United States or a state, or a change of government by other than lawful means, the petitioners, and their subordinates, have denied respondents the right to hold lawful meetings in Jersey City on the ground that they are Communists or Communist organizations; that pursuant to an unlawful plan, the petitioners have caused the eviction from the municipality of persons they considered undesirable because of their labor organization activities, and have announced that they will continue so to do. It further alleges that acting under an ordinance which forbids any person to "distribute or cause to be distributed or strewn about any street or public place any newspapers, paper, periodical, book, magazine, circular, card or pamphlet," the petitioners have discriminated against the respondents by prohibiting and interfering with distribution of leaflets and pamphlets by the respondents while permitting others to distribute similar printed matter; that pursuant to a plan and conspiracy to deny the respondents their Constitutional rights as citizens of the United States, the petitioners have caused respondents, and those acting with them, to be arrested for distributing printed matter in the streets, and have caused them, and their associates, to be carried beyond the limits of the city or to remote places therein, and have compelled

\* All footnotes are omitted.

them to board ferry boats destined for New York; have, with violence and force, interfered with the distribution of pamphlets discussing the rights of citizens under the National Labor Relations Act; have unlawfully searched persons coming into the city and seized printed matter in their possession; have arrested and prosecuted respondents, and those acting with them, for attempting to distribute such printed matter; and have threatened that if respondents attempt to hold public meetings in the city to discuss rights afforded by the National Labor Relations Act, they would be arrested; and unless restrained, the petitioners will continue in their unlawful conduct. The bill further alleges that respondents have repeatedly applied for permits to hold public meetings in the city for the stated purpose, as required by ordinance,<sup>1</sup> although they do not admit the validity of the ordinance; but in execution of a common plan and purpose, the petitioners have consistently refused to issue any permits for meetings to be held by, or sponsored by, respondents, and have thus prevented the holding of such meetings; that the respondents did not, and do not, propose to advocate the destruction or overthrow of the government of the United States, or that of New Jersey, but that their sole purpose is to explain to workingmen the purposes of the National Labor Relations Act, the benefits to be derived from it, and the aid which the Committee for Industrial Organization would furnish workingmen to that end; and all the activities in which they seek to engage in Jersey City were, and are, to be performed peacefully, without intimidation, fraud, violence, or other unlawful methods. . . .

The question now presented is whether freedom to disseminate information concerning the provisions of the National Labor Relations Act, to assemble peaceably for discussion of the Act, and of the opportunities and advantages offered by it, is a privilege or immunity of a citizen of the United States secured against State abridgment<sup>20</sup> by § 1 of the Fourteenth Amendment; and whether Rev. Stat. § 1979 and § 24 (14) of the Judicial Code, 28 U. S. C. A. § 41 (14) afford redress in a federal court for such abridgment. This is the narrow question presented by the record, and we confine our decision to it, without consideration of broader issues which the parties urge. The bill, the answer and the findings fully present the question. The bill alleges, and the findings sustain the allegation, that the respondents had no other purpose than to inform the citizens of Jersey City by speech, and by the written word, respecting matters growing out of national legislation, the constitutionality of which this court has sustained.

Although it has been held that the Fourteenth Amendment created no rights in citizens of the United States, but merely secured existing rights

against state abridgment,<sup>21</sup> it is clear that the right peaceably to assemble and to discuss these topics, and to communicate respecting them, whether orally or in writing, is a privilege inherent in citizenship of the United States which the Amendment protects. . . .

Citizenship of the United States would be little better than a name if it did not carry with it the right to discuss national legislation and the benefits, advantages, and opportunities to accrue to citizens therefrom.

What has been said demonstrates that, in the light of the facts found, privileges and immunities of the individual respondents as citizens of the United States, were infringed by the petitioners, by virtue of their official positions, under color of ordinances of Jersey City, unless, as petitioners contend, the city's ownership of streets and parks is as absolute as one's ownership of his home, with consequent power altogether to exclude citizens from the use thereof, or unless, though the city holds the streets in trust for public use, the absolute denial of their use to the respondents is a valid exercise of the police power. . . .

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

We think the court below was right in holding the ordinance quoted in Note 1 void upon its face.<sup>23</sup> It does not make comfort or convenience in the use of streets or parks the standard of official action. It enables the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent "riots, disturbances or disorderly assemblage." It can thus, as the record discloses, be made the instrument of arbitrary suppression of free expression of views on national affairs for the prohibition of all speaking will undoubtedly "prevent" such eventualities. But uncontrolled official suppression of the privilege cannot be made a substitute for the duty to maintain order in connection with the exercise of the right. . . .

Although the court below held the ordinance void, the decree enjoins the petitioners as to the manner in which they shall administer it. There

is an initial command that the petitioners shall not place "any previous restraint" upon the respondents in respect of holding meetings, provided they apply for a permit as required by the ordinance. This is followed by an enumeration of the conditions under which a permit may be granted or denied. We think this is wrong. As the ordinance is void, the respondents are entitled to a decree so declaring and an injunction against its enforcement by the petitioners. They are free to hold meetings without a permit and without regard to the terms of the void ordinance. . . .

[Justice Stone concurred in a separate opinion, Chief Justice Hughes concurred in part with Justice Roberts and in part with Justice Stone, and Justices McReynolds and Butler dissented.]

## 19. ADMISSION OF STATES INTO THE UNION

While the Constitution of the United States gives to Congress the right to admit new states into the Union, that instrument does not determine the procedure to be followed. Usually, a territory has petitioned Congress to pass an "enabling act" authorizing the holding of a convention within the territory for the purpose of drawing up a proposed state constitution. If this constitution is satisfactory to Congress, that body then passes an act admitting it to statehood in the Union. If the constitution is unsatisfactory to Congress, the territory has to make such changes in it as Congress may demand. Ordinarily, Congress admits one state at a time. On February 22, 1889, however, it passed an omnibus act looking toward the division of the Territory of Dakota into North and South Dakota and the admission of the two territories as well as the territories of Montana and Washington into the Union as states.

[Omnibus Enabling Act of 1889. *U. S. Statutes*, vol. 25, pp. 676-684.]

CHAP. 180.—An act to provide for the division of Dakota into two States and to enable the people of North Dakota, South Dakota, Montana, and Washington to form constitutions and State governments and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the inhabitants of all that part of the area of the United States now constituting the Territories of Dakota, Montana, and Washington, as at present described, may become the States of North Dakota, South Dakota, Montana, and Washington, respectively, as hereinafter provided.

SEC. 2. The area comprising the Territory of Dakota shall, for the purposes of this act, be divided on the line of the seventh standard parallel produced due west to the western boundary of said Territory; and the delegates elected as hereinafter provided to the constitutional convention in districts north of said parallel shall assemble in convention,

at the time prescribed in this act, at the city of Bismarck, and the delegates elected in districts south of said parallel shall, at the same time, assemble in convention at the city of Sioux Falls.

SEC. 3. That all persons who are qualified by the laws of said Territories to vote for representatives to the legislative assemblies thereof, are hereby authorized to vote for and choose delegates to form conventions in said proposed States; and the qualifications for delegates to such conventions shall be such as by the laws of said Territories respectively persons are required to possess to be eligible to the legislative assemblies thereof; and the aforesaid delegates to form said conventions shall be apportioned within the limits of the proposed States, in such districts as may be established as herein provided, in proportion to the population in each of said counties and districts, as near as may be, to be ascertained at the time of making said apportionments by the persons hereinafter authorized to make the same, from the best information obtainable, in each of which districts three delegates shall be elected, but no elector shall vote for more than two persons for delegates to such conventions; that said apportionments shall be made by the governor, the chief-justice, and the secretary of said Territories; and the governors of said Territories shall, by proclamation, order an election of the delegates aforesaid in each of said proposed States, to be held on the Tuesday after the second Monday in May, eighteen hundred and eighty-nine, which proclamation shall be issued on the fifteenth day of April, eighteen hundred and eighty-nine; and such election shall be conducted, the returns made, the result ascertained, and the certificates to persons elected to such convention issued in the same manner as is prescribed by the laws of the said Territories regulating elections therein for Delegates to Congress; and the number of votes cast for delegates in each precinct shall also be returned. The number of delegates to said conventions respectively shall be seventy-five; and all persons resident in said proposed States, who are qualified voters of said Territories as herein provided, shall be entitled to vote upon the election of delegates, and under such rules and regulations as said conventions may prescribe, not in conflict with this act, upon the ratification or rejection of the constitutions.

SEC. 4. That the delegates to the conventions elected as provided for in this act shall meet at the seat of government of each of said Territories, except the delegates elected in South Dakota, who shall meet at the city of Sioux Falls, on the fourth day of July, eighteen hundred and eighty-nine, and, after organization, shall declare, on behalf of the people of said proposed States, that they adopt the Constitution of the United States; whereupon the said conventions shall be, and are hereby,

authorized to form constitutions and State governments for said proposed States, respectively. The constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, and not be repugnant to the Constitution of the United States and the principles of the Declaration of Independence. And said conventions shall provide, by ordinances irrevocable without the consent of the United States and the people of said States:

First. That perfect toleration of religious sentiment shall be secured and that no inhabitant of said States shall ever be molested in person or property on account of his or her mode of religious worship.

Second. That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropriated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States; that the lands belonging to citizens of the United States residing without the said States shall never be taxed at a higher rate than the lands belonging to residents thereof; that no taxes shall be imposed by the States on lands or property therein belonging to or which may hereafter be purchased by the United States or reserved for its use. But nothing herein, or in the ordinances herein provided for, shall preclude the said States from taxing as other lands are taxed any lands owned or held by any Indian who has severed his tribal relations, and has obtained from the United States or from any person a title thereto by patent or other grant, save and except such lands as have been or may be granted to any Indian or Indians under any act of Congress containing a provision exempting the lands thus granted from taxation; but said ordinances shall provide that all such lands shall be exempt from taxation by said States so long and to such extent as such act of Congress may prescribe.

Third. That the debts and liabilities of said Territories shall be assumed and paid by said States, respectively.

Fourth. That provision shall be made for the establishment and maintenance of systems of public schools, which shall be open to all the children of said States, and free from sectarian control.

• • • • •  
SEC. 8. That the constitutional convention which may assemble in South Dakota shall provide by ordinance for resubmitting the Sioux



Falls constitution of eighteen hundred and eighty-five, after having amended the same as provided in section five of this act, to the people of South Dakota for ratification or rejection at an election to be held therein on the first Tuesday in October, eighteen hundred and eighty-nine; but if said constitutional convention is authorized and required to form a new constitution for South Dakota it shall provide for submitting the same in like manner to the people of South Dakota for ratification or rejection at an election to be held in said proposed State on the said first Tuesday in October. And the constitutional conventions which may assemble in North Dakota, Montana, and Washington shall provide in like manner for submitting the constitutions formed by them to the people of said proposed States, respectively, for ratification or rejection at elections to be held in said proposed States on the said first Tuesday in October. At the elections provided for in this section the qualified voters of said proposed States shall vote directly for or against the proposed constitutions, and for or against any articles or propositions separately submitted. The returns of said elections shall be made to the secretary of each of said Territories, who, with the governor and chief-justice thereof, or any two of them, shall canvass the same; and if a majority of the legal votes cast shall be for the constitution the governor shall certify the result to the President of the United States, together with a statement of the votes cast thereon and upon separate articles or propositions, and a copy of said constitution, articles, propositions, and ordinances. And if the constitutions and governments of said proposed States are republican in form, and if all the provisions of this act have been complied with in the formation thereof, it shall be the duty of the President of the United States to issue his proclamation announcing the result of the election in each, and thereupon the proposed States which have adopted constitutions and formed State governments as herein provided shall be deemed admitted by Congress into the Union under and by virtue of this act on an equal footing with the original States from and after the date of said proclamation.

SEC. 9. That until the next general census, or until otherwise provided by law, said States shall be entitled to one Representative in the House of Representatives of the United States, except South Dakota, which shall be entitled to two; and the Representatives to the Fifty-first Congress, together with the governors and other officers provided for in said constitutions, may be elected on the same day of the election for the ratification or rejection of the constitutions; and until said State officers are elected and qualified under the provisions of each constitution and the States, respectively, are admitted into the Union, the Territorial

officers shall continue to discharge the duties of their respective offices in each of said Territories.

. . . . .

SEC. 24. That the constitutional conventions may, by ordinance, provide for the election of officers for full State governments, including members of the legislatures and Representatives in the Fifty-first Congress; but said State governments shall remain in abeyance until the States shall be admitted into the Union, respectively, as provided in this act. In case the constitution of any of said proposed States shall be ratified by the people, but not otherwise, the legislature thereof may assemble, organize, and elect two Senators of the United States; and the governor and secretary of state of such proposed State shall certify the election of the Senators and Representatives in the manner required by law; and when such State is admitted into the Union, the Senators and Representatives shall be entitled to be admitted to seats in Congress, and to all the rights and privileges of Senators and Representatives of other States in the Congress of the United States; and the officers of the State governments formed in pursuance of said constitutions, as provided by the constitutional conventions, shall proceed to exercise all the functions of such State officers; and all laws in force made by said Territories, at the time of their admission into the Union, shall be in force in said States, except as modified or changed by this act or by the constitutions of the States, respectively.

SEC. 25. That all acts or parts of acts in conflict with the provisions of this act, whether passed by the legislatures of said Territories or by Congress, are hereby repealed.

Approved, February 22, 1889.

## 20. STATE LAW AND TREATIES

Within the general scope of their reserved powers, the states may enact laws regulating the rights of aliens residing within their borders. In such cases the aliens affected may claim that the state law undertakes to deprive them of rights secured for them by treaties in force between the United States and the country of which they are citizens. Since, under the Constitution of the United States, treaties are a part of the supreme law of the land, there are only two grounds on which a state law alleged to be in conflict with a treaty can be sustained. The first is that the treaty is invalid because it relates to a matter which is not a proper subject of international negotiation. The second is that there is no conflict between the state law and the treaty. One of the most conspicuous of the state laws and local ordinances which have given rise to international difficulties was the San Francisco school ordinance requiring Orientals to attend separate schools, which was alleged to be in conflict with provisions of a treaty between the United States

and Japan. More recently the trade agreements program of the national government encountered occasional difficulty through the tax policy of some states, and adjustments were necessary.

### a. The San Francisco School Question

[Elihu Root, "The Real Question Under the Japanese Treaty and the San Francisco School Board Resolution", *American Journal of International Law*, vol. I, pp. 274-283 (Apr., 1907).]

The treaty of November 22, 1894, between the United States and Japan provided, in the first article:

" . . . The citizens or subjects of each of the two high contracting parties shall have full liberty to enter, travel, or reside in any part of the territory of the other contracting party, and shall enjoy full and perfect protection for their persons and property. . . .

" In whatever relates to rights of residence and travel; to the possession of goods and effects of any kind; to the succession to personal estate, by will or otherwise, and the disposal of property of any sort and in any manner whatsoever which they may lawfully acquire, the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights, and shall be subject to no higher imposts or charges in these respects than native citizens or subjects or citizens or subjects of the most favored nation. . . ."

The statutes [of California] provide in section 1662 of the school law:

" Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of school trustees, or city board of education, have power to admit adults and children not residing in the district, whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy or vicious habits, or children suffering from contagious or infectious diseases, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school."

On the 11th of October, 1906, the board of education of San Francisco adopted a resolution in these words:

" *Resolved*: That in accordance with Article X, section 1662, of the school law of California, principals are hereby directed to send all Chinese, Japanese, or Korean children to the Oriental Public School, situated on the south side of Clay street, between Powell and Mason streets, on and after Monday, October 15, 1906."

The school system thus provided school privileges for all resident children, whether citizen or alien; all resident children were included in the basis for estimating the amount to be raised by taxation for school purposes; the fund for the support of the school was raised by general taxation upon all property of resident aliens as well as of citizens; and all resident children, whether of aliens or of citizens, were liable to be compelled to attend the schools. So that, under the resolution of the board of education, the children of resident aliens of all other nationalities were freely admitted to the schools of the city in the neighborhood of their homes, while the children of Indians, Chinese and Japanese were excluded from those schools, and were not only deprived of education unless they consented to go to the special oriental school on Clay street, but were liable to be forcibly compelled to go to that particular school.

. . .

It is obvious that three distinct questions were raised by the claim originating with Japan and presented by our national government to the courts in San Francisco. The first and second were merely questions of construction of the treaty. . . .

The other question was whether, if the treaty had the meaning which the government of Japan ascribed to it, the government of the United States had the constitutional power to make such a treaty agreement with a foreign nation which should be superior to and controlling upon the laws of the state of California. A correct understanding of that question is of the utmost importance not merely as regards the state of California, but as regards all states and all citizens of the Union.

There was a very general misapprehension of what this treaty really undertook to do. It was assumed that in making and asserting the validity of the treaty of 1894 the United States was asserting the right to compel the state of California to admit Japanese children to its schools. No such question was involved. That treaty did not, by any possible construction, assert the authority of the United States to compel any state to maintain public schools, or to extend the privileges of its public schools to Japanese children or to the children of any alien residents. The treaty did assert the right of the United States, by treaty, to assure to the citizens of a foreign nation residing in American territory equality of treatment with the citizens of other foreign nations, so that if any state chooses to extend privileges to alien residents as well as to citizen residents, the state will be forbidden by the obligation of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign

countries. The effect of such a treaty, in respect of education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the state shall furnish education; it is a prohibition against discrimination when the state does choose to furnish education. It leaves every state free to have public schools or not, as it chooses, but it says to every state: "If you provide a system of education which includes alien children, you must not exclude these particular alien children."

It has been widely asserted or assumed that this treaty provision and its enforcement involved some question of state's rights. There was and is no question of state's rights involved, unless it be the question which was settled by the adoption of the constitution.

This will be apparent upon considering the propositions which I will now state:

1. The people of the United States, by the constitution of 1787, vested the whole treaty-making power in the national government. . . .

Legislative power is distributed: upon some subjects the national legislature has authority; upon other subjects the state legislature has authority. Judicial power is distributed: in some cases the federal courts have jurisdiction, in other cases the state courts have jurisdiction. Executive power is distributed: in some fields the national executive is to act; in other fields the state executive is to act. The treaty-making power is not distributed; it is all vested in the national government; no part of it is vested in or reserved to the states. In international affairs there are no states; there is but one nation, acting in direct relation to and representation of every citizen in every state. Every treaty made under the authority of the United States is made by the national government, as the direct and sole representative of every citizen of the United States residing in California equally with every citizen of the United States residing elsewhere. It is, of course, conceivable that, under pretense of exercising the treaty-making power, the president and senate might attempt to make provisions regarding matters which are not proper subjects of international agreement, and which would be only a colorable—not a real—exercise of the treaty-making power; but so far as the real exercise of the power goes, there can be no question of state rights, because the constitution itself, in the most explicit terms, has precluded the existence of any such question.

2. Although there are no express limitations upon the treaty-making power granted to the national government, there are certain implied limitations arising from the nature of our government and from other provisions of the constitution; but those implied limitations do not in the

slightest degree touch the making of treaty provisions relating to the treatment of aliens within our territory.

In the case of *Geofroy v. Riggs*, which, in 1889, sustained the rights of French citizens under the treaty of 1800 to take and hold real and personal property in contravention of the common law and the statutes of the state of Maryland, the supreme court of the United States said:

"That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations is clear. . . . The treaty power, as expressed in the constitution, is in terms unlimited except by those restraints which are found in that instrument against the action of the government or of its departments, and those arising from the nature of the government itself and of that of the states. It would not be contended that it extends so far as to authorize what the constitution forbids, or a change in the character of the government, or in that of one of the states, or a cession of any portion of the territory of the latter without its consent. But with these exceptions it is not perceived that there is any limit to the questions which can be adjusted touching any matter which is properly the subject of negotiation with a foreign country."

3. Reciprocal agreements between nations regarding the treatment which the citizens of each nation shall receive in the territory of the other nation are among the most familiar, ordinary and unquestioned exercises of the treaty-making power. To secure the citizens of one's country against discriminatory laws and discriminatory administration in the foreign countries where they may travel or trade or reside is, and always has been, one of the chief objects of treaty making, and such provisions always have been reciprocal. . . .

4. It has been settled for more than a century that the fact that a treaty provision would interfere with or annul the laws of a state as to the aliens concerning whom the provision is made, is no impeachment of the treaty's authority.

The very words of the constitution, that the judges in every state shall be bound by a treaty "any thing in the constitution or laws of any state to the contrary notwithstanding," necessarily imply an expectation that some treaties will be made in contravention of laws of the states. Far from the treaty-making power being limited by state laws, its scope is entirely independent of those laws; and whenever it deals with the same subject, if inconsistent with the law, it annuls the law. This is true as to any laws of the states, whether the legislative authority under which they are passed is concurrent with that of congress, or exclusive of that of congress. . . .



5. Since the rights, privileges, and immunities, both of person and property, to be accorded to foreigners in our country and to our citizens in foreign countries are a proper subject of treaty provision and within the limits of the treaty-making power, and since such rights, privileges, and immunities may be given by treaty in contravention of the laws of any state, it follows of necessity that the treaty-making power alone has authority to determine what those rights, privileges, and immunities shall be. No state can set up its laws as against the grant of any particular right, privilege, or immunity any more than against the grant of any other right, privilege, or immunity. No state can say a treaty may grant to alien residents equality of treatment as to property but not as to education, or as to the exercise of religion and as to burial but not as to education, or as to education but not as to property or religion. That would be substituting the mere will of the state for the judgment of the president and senate in exercising a power committed to them and prohibited to the states by the constitution. . . .

#### **b. Proposed Ohio Tax on Imported Wines**

[Letter of Secretary of State Hull to Governor John W. Bricker of Ohio, Apr. 5, 1939. Text in *State Department Press Releases*, Apr. 8, 1939, p. 265.]

April 5, 1939.

*My Dear Governor:*

My attention has been directed to a bill (H.B. No. 363) now pending in the legislature of Ohio which would impose discriminatory taxes on all wines imported from foreign countries into the State of Ohio.

According to my information, the proposed measure to which I have referred would impose a tax of 50 cents per wine gallon on all imported still wines and vermouth and a tax of \$1.50 per wine gallon on imported sparkling wines and champagnes. The tax rates on similar wines produced in the United States would, I understand, amount to only fifteen to twenty-five cents per wine gallon.

I feel it my duty to call to your attention the serious embarrassment which the enactment of such a measure would cause in the conduct of our foreign relations and to the consequences which it might have upon the sale of American products abroad. The Federal Government is engaged in a comprehensive program for the restoration of our foreign commerce through the removal of excessive and discriminatory burdens on the sale of American goods in foreign countries. The imposition by any state of discriminatory burdens upon imported goods would not only

interfere with these efforts, but would invite retaliation against American exports.

The proposed bill would affect principally our trade with France. The United States has a large export trade with that country, including many articles of which the State of Ohio is an important producer. Concessions of substantial benefit to this trade were obtained by the United States in the trade agreement concluded with France in 1936. Among the advantages granted by the United States in return for these concessions were duty reductions on wines and champagnes, which are, of course, items of great importance to French export trade. Action by any state to place discriminatory tax burdens on French wines would obviously be regarded by the French Government as an impairment of these concessions and would, I am firmly convinced, inevitably react to the disadvantage of exporters in Ohio and in other states of the Union.

Sincerely yours,

CORDELL HULL

[The Secretary of State of Ohio replied to Secretary Hull, April 12, 1939, indicating that the bill in question had been withdrawn.]

## CHAPTER IV

### INTERSTATE RELATIONS

#### 21. EXTRADITION

There are many problems in interstate relations that arise out of the independent position of the states in the Union, of which one of the most difficult is that relating to the enforcement of law. The Constitution attempts to provide at least a partial remedy for this particular difficulty by requiring the extradition of persons who have fled from one state to another in order to escape the legal processes. This constitutional provision has been supplemented by statutes of Congress, providing the detailed regulations under which extradition is to be carried out. Although both the constitutional and statutory provisions are of a mandatory character, the governors have exercised their discretion and have frequently refused to give up persons demanded in the proper manner. The courts have held that governors cannot be compelled to extradite, hence the result has been to enhance the discretionary powers of the governor, and to make him in effect a judicial officer.

[Letter of Governor Ferguson of Texas to Governor Fuller of Massachusetts, Mar. 24, 1925. *N. Y. Times*, Mar. 25, 1925.]

. . . . .

Permit me to say, that after a study of the facts and the many authorities cited, I am more convinced than ever that my former action in refusing the rendition of Albert P. Russell was based upon both law and justice.

In doing this I do not impugn the good faith of Massachusetts or her officials charged with the administration of her laws. I have only chosen to use my discretion as I am permitted to do under the law. . . .

I have many precedents, either right or wrong, but the most vivid to my memory of them all is the action of a Governor of Massachusetts a short time ago in refusing to honor the requisition of Governor John J. Cornwell of West Virginia for the interstate rendition of a negro charged with a felony in West Virginia, who sought a haven of safety in your State and found it.

The story is that the Governor of West Virginia made many demands upon the Bay State Governor for this negro and the Massachusetts Governor refused to deliver him because, as stated by him, he feared the negro would not receive a fair trial in the State of West Virginia. The negro's name was Johnson.

Assuring you that I shall not, as long as I am Governor, permit the Lone Star State to become a haven of refuge to which criminals might flee, on the one hand, or allow its high office to degrade to the order of a collecting agency, on the other, I beg to remain, sir, respectfully yours,

MIRIAM A. FERGUSON,

Governor.

## 22. PRIVILEGES AND IMMUNITIES

The Constitution contains two provisions guaranteeing the privileges and immunities of citizenship to citizens of each state and of the United States, but without defining what is meant by such privileges and immunities. The courts have been compelled to decide several cases involving this guaranty, but have not interpreted it in any explicit manner. They have, however, given a general interpretation which was probably best stated in a case involving the rights of corporations in the state of Virginia, decided in 1869.

[*Paul v. Virginia* (1869), 8 Wall. 168, 180-181; 19 L. Ed. 357, 360.]

It was undoubtedly the object of the clause in question to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. *Lemmon v. People*, 20 N. Y. 607.

Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists.

But the privileges and immunities secured to citizens of each State in the several States, by the provision in question, are those privileges and immunities which are common to the citizens in the latter States under their Constitution and laws by virtue of their being citizens. Special privileges enjoyed by citizens in their own States are not secured in other States by this provision. It was not intended by the provision to give to the laws of one State any operation in other States. They can

have no such operation, except by the permission, express or implied, of those States. The special privileges which they confer must, therefore, be enjoyed at home, unless the assent of other States to their enjoyment therein be given.

### 23. COMPACTS

The states are forbidden by the Constitution to enter into treaties with one another, but may make compacts, provided only that Congress gives its consent. Although the procedure is somewhat cumbersome, the compact therefore affords a means by which any two or more states may settle difficulties and accomplish common purposes, and has, in fact, been more widely used during recent years than in our earlier history. Approximately 100 compacts or agreements have been entered into during the first 150 years, more than 25 of them during the decade of 1929-1939. These compacts have also dealt with a wide variety of subjects, at first chiefly boundaries but with increasing attention during more recent years to social and economic problems which concern areas larger than a single state but may not clearly be within the jurisdiction of the United States.

#### a. Procedure of Negotiating Compacts

[*First Report of the Massachusetts Commission on Interstate Compacts affecting Labor and Industries* (Jan., 1934), pp. 69-73.]

The language of the Constitution referring to compacts prescribes no procedure for negotiating them, and no general law specifying such procedure has ever been passed by Congress. For many years after the adoption of the Constitution, the requirement of congressional assent appears to have been considered rather unimportant; such assent was rarely sought in advance, and sometimes no application was made for it even after compacts had been negotiated. For compacts on certain subjects there is some authority that congressional assent must be secured in advance, but for compacts on the more common subjects, such as boundaries, no advance assent is apparently necessary. The argument is sometimes made that for certain types of arrangements between States that do not affect their authority in any great degree, or increase the strength of one at the expense of the other, no congressional assent is really necessary. The absence of such assent, however, is liable to raise questions about validity, and there is no real reason for failing to obtain it, because in every case where any real justification for a compact could be shown, the assent of Congress has been forthcoming.

In some instances in which the assent of Congress to a compact was not expressly requested or given, action has been taken by Congress after completion of the compact that has had the effect of sanctioning the com-

pact indirectly, and in suits that have come before the courts, involving compacts to which approval has thus been indirectly given, the courts have held that such indirect or implied assent was sufficient to make the compact valid. Probably because of the new types of questions with which most recent proposed compacts have been concerned, the more common procedure now is to ask the assent of Congress in advance, as soon as a definite proposition has been worked out informally by the States likely to participate in the final compact.

The first step in the usual procedure of making a compact is for each State concerned to pass legislation authorizing a person or commission representing the State to negotiate and conclude a tentative compact, which is then submitted to the legislature of each State for ratification. As soon as the States take action, the compact becomes effective, unless some further requirements are imposed by Congress. This procedure, especially the use of small commissions representing each State concerned, is practically a continuation of that used before the Revolution in settling boundary disputes between the original colonies, and in settling similar disputes between States after the Constitution was adopted. Even this rather simple procedure may involve a considerable lapse of time, because each legislature may act once to authorize negotiations, and a second time to ratify the compact negotiated. These two proceedings usually must occur after a lapse of at least two years, because most legislatures meet biennially.

In dealing with simple boundary compacts it has been the general practice not to ask for congressional approval in advance, because Congress could not know what it was to approve until a boundary line had been actually run to the satisfaction of both States concerned. The States have usually established their commissions, run a line, and passed acts agreeing to the line established, before they asked for congressional approval. In dealing with the more complex problems that have arisen in the last twenty or thirty years, Congress has often given its approval for negotiation of the compact and provided that the compact should not take effect until after Congress had also approved its final form. In its first action, Congress has also imposed special conditions under some circumstances, such as a time limit within which negotiations must be completed and a requirement that the federal government must be represented at the negotiations by some official designated for the purpose. Power to designate is usually given to the President. Congress has sometimes reserved power to withdraw its assent, or to alter the conditions under which its assent has been given, by modifying the legis-



lation that it has passed to authorize the compact. It does not appear, however, that any case has arisen in which Congress has attempted to prescribe the procedure to be followed in actual negotiations.

Unless the power of a state Governor is limited by his state Constitution, there is no apparent reason why a Governor may not appoint a commission or official to negotiate a compact for submission to the legislature of his State, but financial and other considerations often make such action impracticable. On a few occasions the legislatures of the States concerned in a dispute have empowered specified officials to conclude binding compacts not subject to further ratification, but such instances are rare and seem to have occurred when the claims and rights of the parties had been made reasonably clear in the course of litigation conducted to secure a judgment on the questions in dispute; that is, these so-called compacts have amounted to little more than authority by the legislature to the state Attorney-General to approve a decree of court, to be entered with the consent of the parties.

The size of negotiating commissions has varied. In a few instances where several States were involved, one negotiator has acted for each State; in boundary and navigation controversies commissions of three to represent each party have usually been designated. Sometimes the two or more state commissions dealing with the dispute have organized themselves into a joint commission and sometimes not. In working out the details of each compact, the variety of questions considered and the difference in surrounding conditions have necessitated variations in procedure to meet practical requirements. In the absence of constitutional or legal provisions demanding a particular course of procedure, such methods have been developed in each negotiation as seemed best to handle the questions involved.

The majority of compacts now take the form of signed agreements. To establish such agreements, the principal steps generally are as follows:<sup>1</sup>

- (1) The act of Congress authorizing negotiation of a compact and specifying the purposes of the parties. Securing such approval first is now customary, as already noted, although it is not absolutely required. The act of assent will contain the conditions that must be satisfied in subsequent negotiations and action by the States concerned.

- (2) Action by state legislatures authorizing commissioners representing the several States to meet and negotiate the compact. Usually such

<sup>1</sup> Adapted from "Oil Conservation through Interstate Agreement," Federal Oil Conservation Board, Washington, 1933, pp. 211-213.

acts provide that the compact must be ratified by these States before it will become effective. If Congress requests participation by a representative of the federal government, the state legislatures must recognize such a requirement.

(3) Actual meeting of the commissioners, discussion and determination of the details of the compact, and signature by the commissioners personally. The final agreement need not follow any standard form, but copies of recent compacts can be readily found for use as models. The original of this agreement is usually deposited in the Department of State at Washington, and certified copies are sent to the proper officials of the negotiating States.

(4) Adoption or ratification of the compacts by the state legislatures. This is usually in the form of an act or resolution reciting previous authorization, the agreement upon the compact, the full text of the compact itself, and a clause or section putting the compact in effect and establishing it as law in the State.

(5) Action by Congress to ratify the compact. If the compact meets requirements previously fixed by Congress, the ratifying statute is hardly more than a routine matter with a simple form. If the compact affects federal powers or duties, Congress may, in its ratifying act, reserve any or all federal authority to deal with subsequent questions.

A less common method of establishing a compact is by reciprocal legislation; that is, one State passing a statute to become effective when one or more other States adopt the same act, or one of similar character. This method does not require any signed agreement, so that the procedure to be followed varies somewhat from that used where a signed agreement is considered necessary. A compact made by reciprocal legislation does require authorization of the compact by Congress, and this may be of similar form to that given when the compact is to be in writing and signed. The representatives of the States must then agree on a uniform statute to be recommended to their respective States. Such a statute will be reciprocal or conditional, to become effective when the other States concerned agree upon similar provisions. If they do not so agree, there is no compact. As soon as these statutes are enacted by the several States, it is the usual practice for each State to notify all the others. When this has been done, a compact so made will require ratification by Congress unless a blanket authorization has been given by Congress in the first place.

**b. The Colorado River Compact**

[*Current History*, vol. 17, pp. 1000-1002 (Mar., 1923).]

The States of Arizona,<sup>1</sup> California, Colorado, Nevada, New Mexico, Utah and Wyoming, having resolved to enter into a compact under the act of the Congress of the United States of America approved Aug. 19, 1921 (42 Statutes at large, page 171), and the acts of the Legislature of the said States, have through their Governors appointed as their Commissioners: W. S. Norviel for the State of Arizona, W. F. McClure for the State of California, Delph E. Carpenter for the State of Colorado, J. G. Scrugham for the State of Nevada, Stephen B. Davis, Jr. for the State of New Mexico, R. E. Caldwell for the State of Utah, Frank C. Emerson for the State of Wyoming, who, after negotiations participated in by Herbert Hoover, appointed by the President as the representative of the United States of America, have agreed upon the following articles

ARTICLE 1—The major purposes of this compact are to provide for the equitable division and apportionment of the use of the waters of the Colorado River system; to establish the relative importance of different beneficial uses of water; to promote interstate comity; to remove causes of present and future controversies; and to secure the expeditious agricultural and industrial development of the Colorado River basin, the storage of its waters and the protection of life and property from floods. To these ends the Colorado River basin is divided into two basins, and an apportionment of the use of part of the water of the Colorado River system is made to each of them, with the provision that further equitable apportionments may be made.

[ARTICLE 2 defines various terms used in the compact.]

ARTICLE 3—(a) There is hereby apportioned from the Colorado River system in perpetuity to the upper basin and to the lower basin respectively the exclusive beneficial consumptive use of 7,500,000 acre feet of water per annum, which shall include all water necessary for the supply of any rights which may now exist.

(b) In addition to the apportionment in paragraph (a), the lower basin is hereby given the right to increase its beneficial consumptive use of such waters by 1,000,000 acre feet per annum.

(c) If, as a matter of international comity, the United States of America shall hereafter recognize in the United States of Mexico any right to the use of any waters of the Colorado River system, such water shall be supplied first from the waters which are surplus over and above the aggregate of the quantities specified in paragraphs (a) and (b); and

<sup>1</sup> Arizona refused to ratify, and in 1925 her participation was waived.

if such surplus shall prove insufficient for this purpose, then the burden of such deficiency shall be equally borne by the upper basin and the lower basin, and whenever necessary the States of the upper division shall deliver at Lee Ferry water to supply one-half of the deficiency so recognized in addition to that provided in paragraph (d).

(d) The States of the upper division will not cause the flow of the river at Lee Ferry to be depleted below an aggregate of 75,000,000 acre feet for any period of ten consecutive years reckoned in continuing progressive series beginning with the first day of October next succeeding the ratification of this compact.

(e) The States of the upper division shall not withhold water, and the States of the lower division shall not require the delivery of water, which cannot reasonably be applied to domestic and agricultural uses.

(f) Further equitable apportionment of the beneficial uses of the waters of the Colorado River system unapportioned by paragraphs (a), (b) and (c) may be made in the manner provided in paragraph (g) at any time after Oct. 1, 1963, if and when either basin shall have reached its total beneficial consumptive use as set out in paragraphs (a) and (b).

(g) In the event of a desire for a further apportionment as provided in paragraph (f) any two signatory States, acting through their Governors, may give joint notice of such desire to the Governors of the other signatory States and to the President of the United States of America, and it shall be the duty of the Governors of the signatory States and of the President of the United States of America forthwith to appoint representatives, whose duty it shall be to divide and apportion equitably between the upper basin and lower basin the beneficial use of the unapportioned water of the Colorado River system as mentioned in paragraph (f), subject to the legislative ratification of the signatory States and the Congress of the United States of America.

ARTICLE 4—(a) Inasmuch as the Colorado River has ceased to be navigable for commerce and the reservation of its waters for navigation would seriously limit the development of its basin, the use of its waters for purposes of navigation shall be subservient to the uses of such waters for domestic, agricultural and power purposes. If the Congress shall not consent to this paragraph, the other provisions of this compact shall nevertheless remain binding.

(b) Subject to the provisions of this compact, water of the Colorado River system may be impounded and used for the generation of electrical power, but such impounding and use shall be subservient to the use and consumption of such water for agricultural and domestic purposes and shall not interfere with or prevent use for such dominant purposes.

(c) The provisions of this article shall not apply to or interfere with the regulation and control by any State within its boundaries of the appropriation, use and distribution of water.

ARTICLE 5—The chief official of each signatory State charged with the administration of water rights, together with the Director of the United States Reclamation Service and the Director of the United States Geological Survey, shall co-operate, *ex officio* :

(a) To promote the systematic determination and co-ordination of the facts as to flow, appropriation, consumption and use of water in the Colorado River basin, and the interchange of available information in such matters.

(b) To secure the ascertainment and publication of the annual flow of the Colorado River at Lee Ferry.

(c) To perform such other duties as may be assigned by mutual consent of the signatories from time to time.

ARTICLE 6—Should any claim or controversy arise between any two or more of the signatory States: (a) with respect to the waters of the Colorado River system not covered by the terms of this compact; (b) over the meaning or performance of any of the terms of this compact; (c) as to the allocation of the burdens incident to the performance of any article of this compact or the delivery of waters as herein provided; (d) as to the construction or operation of works within the Colorado River basin to be situated in two or more States, or to be constructed in one State for the benefit of another State; or (e) as to the diversion of water in one State for the benefit of another State; the Governors of the States affected, upon the request of one of them, shall forthwith appoint Commissioners with power to consider and adjust such claim or controversy, subject to ratification by the Legislatures of the States so affected.

Nothing herein contained shall prevent the adjustment of any such claim or controversy by any present method or by direct future legislative action of the interested States.

ARTICLE 7—Nothing in this compact shall be construed as affecting the obligations of the United States of America to Indian tribes.

ARTICLE 8—Present perfected rights to the beneficial use of waters of the Colorado River system are unimpaired by this compact. Whenever storage capacity of 5,000,000 acre feet shall have been provided on the main Colorado River within or for the benefit of the lower basin, then claims of such rights, if any, by appropriators or users of water in the lower basin against appropriators or users of water in the upper

basin shall attach to and be satisfied from water that may be stored not in conflict with Article 3.

All other rights to beneficial use of waters of the Colorado River system shall be satisfied solely from the water apportioned to that basin in which they are situate.

ARTICLE 9—Nothing in this compact shall be construed to limit or prevent any State from instituting or maintaining any action or proceeding, legal or equitable, for the protection of any right under this compact or the enforcement of any of its provisions.

ARTICLE 10—This compact may be terminated at any time by the unanimous agreement of the signatory States. In the event of such termination all rights established under it shall continue unimpaired.

ARTICLE 11—This compact shall become binding and obligatory when it shall have been approved by the Legislature of each of the signatory States and by the Congress of the United States.<sup>1</sup> Notice of approval by the Legislatures shall be given by the Governor of each signatory State to the Governors of the other signatory States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of the signatory States of approval by the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

DONE at the City of Santa Fe, New Mexico, this twenty-fourth day of November, A. D. One Thousand Nine Hundred and Twenty-two.

W. S. NORVIEL,  
W. F. McCLURE,  
DELPH E. CARPENTER,  
J. G. SCRUGHAM,  
STEPHEN B. DAVIS JR.,  
R. E. CALDWELL,  
FRANK C. EMERSON.

Approved:

HERBERT HOOVER

<sup>1</sup> Ratified by six states (not Arizona) in 1923, and by Congress in Boulder Canyon Project Act of Dec. 21, 1928 (45 Stat. 1057, 1064 [sec. 13]).



**c. Minimum Wage Compact**

[*U. S. Statutes*, vol. 50, pt. 1, pp. 633-637.]

Joint resolution granting the consent of Congress to the minimum wage compact ratified by the Legislatures of Massachusetts, New Hampshire, and Rhode Island.

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, That the compact for establishing uniform standards for conditions of employment, particularly with regard to the minimum wage in States ratifying the same, which was signed in Concord, New Hampshire, on May 29, 1934, by representatives of the Governors of Maine, New Hampshire, Connecticut, Massachusetts, Rhode Island, New York, and Pennsylvania, and which was ratified by the Legislature of Massachusetts on June 30, 1934, and by the Legislature of New Hampshire on May 29, 1935, and by the Legislature of Rhode Island on May 1, 1936, is hereby approved and declared to be effective in accordance with the terms thereof, which compact is as follows:

COMPACT FOR ESTABLISHING UNIFORM STANDARDS FOR CONDITIONS OF  
EMPLOYMENT, PARTICULARLY WITH REGARD TO THE MINIMUM  
WAGE, IN STATES RATIFYING THE SAME

TITLE I—POLICY AND INTENT

Whereas enforcement among the industrial States of the Union of reasonably uniform standards for labor in industry, determined in accordance with the general welfare, would not only benefit labor but would be of real advantage to employers, removing the pressure toward low wages, long hours of work, exploitation of minors and women, and similar action commonly admitted to be injurious to all concerned; and

Whereas the advantages of such uniform standards have already been indicated by the operation of the National Industrial Recovery Act and the codes of fair competition adopted thereunder; and

Whereas such operation points to the desirability of continued uniform legislation affecting labor standards, by Federal action or otherwise, and of joint action by the States to establish such uniform standards; and

Whereas the establishment of reasonably uniform standards in States concerned with the same general fields of industry and competitors in

the same markets will afford the advantages of stability in labor legislation to all concerned, with disadvantage to none: Now, therefore,

The States whose commissioners have signed this compact and which have, by their legislature, ratified the same, acting to promote the general welfare of the people, do hereby join in establishing the said compact to provide uniform minimum standards affecting labor and industry in the said States: *Provided, however,* That nothing herein contained shall be construed as abrogating, repealing, modifying, or interfering with the operation of laws already in effect in any State party hereto which establish standards equivalent to or above those herein specified, nor to prevent or discourage the enactment of additional laws establishing similar or higher standards; nor shall anything herein contained repeal or affect any laws concerning conditions of employment that are not in conflict herewith or that deal with subjects not included herein: *And provided further,* That no part of any title of this compact nor of any legislation adopted in pursuance thereof, except as may be expressly specified in such title or in such legislation, shall be in effect in any State party hereto until this compact shall have been approved as provided in section 6 of title II, but whenever titles I and II hereof and any other title included herein are so approved and ratified, such titles shall be in full force and effect as laws of the States so approving and ratifying the same.

#### TITLE II—GENERAL PROVISIONS

SECTION 1. Each State party to this compact shall require its administrative agency or agencies charged with the administration and enforcement of this compact and of State laws relating thereto, to make comprehensive and detailed reports concerning the operation and administration of said compact and laws. Such agency shall report at least once each year and shall send copies of such report to the interstate commission established under the following section, to the Governors of the several ratifying States and to the appropriate administrative agencies in such States.

SEC. 2. Each State party hereto shall make provision for a continuing unpaid commission representing industry, labor, and the public, and appointed by the Governor of said State, to deal with the other ratifying States concerning questions arising under this compact and the operation of the same within the limits of their respective States. The chairman of such State commission shall be designated by the Governor and shall be the representative of his State on an interstate commission which shall be composed of the representatives so designated by the several States

parties to this compact. The Governors of the signatory States shall request the President of the United States to appoint a representative of the Federal Government to the interstate commission. The expenses of the interstate commission shall be shared equally by the States ratifying this compact. The interstate commission shall annually make a report of its activities and shall furnish copies to the Governors of the ratifying States and to the permanent commissions of such States.

SEC. 3. Should any question arise on the part of one or more of the States ratifying this compact concerning a matter involved in said compact or in any State law adopted in pursuance thereof, then such question shall be brought before the said interstate commission for consideration. Said interstate commission shall make any necessary investigations, shall publish its findings and any recommendations, and shall furnish copies of such findings and recommendations to the State commissions in each State party to this compact.

SEC. 4. If any ratifying State should desire a modification of any provision or provisions of this compact, or a revision of the entire compact, or if for any reason it should become desirable to extend the scope of said compact, the aforesaid interstate commission shall, upon the application of one or more of the ratifying States, and after thirty days' notice to the Governors and State commissions of the other States, proceed to consider such application and the reasons advanced for the proposed modification or revision and shall make such recommendations to the ratifying States concerning the same as may seem fitting and proper. Whenever said modifications, revision, or extension is ratified in the manner prescribed in section 6 of this title for the ratification of this original compact, and the Congress of the United States has consented thereto, then such modification, revision, or extension shall be in full force and effect in the States ratifying the same.

SEC. 5. Each State party to this compact agrees that it will not withdraw therefrom until it has reported to the interstate commission the reasons for its desire to withdraw. The interstate commission shall, upon receipt of such report, investigate the situation and shall, within six months, submit its recommendations. If the State still desires to withdraw from the compact, it shall defer such action for two years from the date of the findings of the interstate commission.

SEC. 6. Upon ratification by the legislative act of the requisite number of States, as specified in subsequent titles of this compact, and with the consent of the Congress of the United States, this compact shall be in full force and effect in the States ratifying the same. Each State so ratifying shall forthwith enact necessary and suitable legislation to estab-

lish and maintain the minimum standards set forth in the following title or titles and shall make provision for the continuing State commission required by section 2 of this title. The appropriate administrative agencies of each State shall thereafter enforce and supervise the operation of the laws relating to this compact and the laws enacted to make the provisions of said compact effective.

SEC. 7. Any State may at any time become a party to this compact by taking the action required by the preceding section of this title to ratify the same, subject to the consent of the Congress of the United States.

SEC. 8. If any part of this compact or the application thereof to any person or circumstance should be held to be contrary to the constitution of any ratifying State or of the United States, all other separable parts of said compact and the application of such parts to other persons or circumstances shall continue to be in full force and effect.

#### TITLE III—MINIMUM WAGE

SECTION 1. No employer shall pay a woman, or a minor under twenty-one years of age, an unfair or oppressive wage.

SEC. 2. The State agency administering the minimum-wage law enacted in conformity with this compact shall have authority to investigate the wages of women and minors; to appoint wage boards, upon which employers, employees, and the public shall have equal representation, for the purpose of recommending minimum fair wage rates for women and minors; and, after a public hearing, to enter directory orders based on the determinations of the wage boards, together with such administrative rulings as are appropriate to make the determinations effective; and may have further authority, without the agency of a wage board, to enter such orders in the case of occupations with less than a specified number of employees.

SEC. 3. The State administrative agency and the wage boards appointed by such agency shall have authority to administer oaths and to require, by subpoena, the attendance and testimony of witnesses and the production of records relative to the wages of women and minors.

SEC. 4. The State administrative agency shall have further authority to inspect to determine compliance with its orders; to publish the names of employers violating a directory order; and, after a directory order has been in effect for a specified period, to make such order mandatory after a public hearing thereon. Such mandatory order shall carry a penalty

of fine, imprisonment, or both. Said agency shall have authority to reconvene wage boards or to form new wage boards for the purpose of modifying wage orders. It shall have authority at any time, on its own motion, to modify administrative regulations after a public hearing thereon.

SEC. 5. The State administrative agency shall have authority to issue special licenses to employees who, by reason of physical or mental condition, are incapable of earning the minimum fair wage rate established for the occupation in which they are employed. Said agency shall have authority to take assignment of wage claims at the request of women or minor employees paid less than the minimum wage to which they are entitled under a mandatory order, and to bring legal action necessary to collect such claims. Such employees shall be authorized, under the statute, to recover by civil action the full amount to which they are entitled under a mandatory fair wage order.

SEC. 6. Employers subject to the minimum-wage law enacted in conformity herewith shall be required to keep specified records, including the names, addresses, occupations, hours, and wages of the women and minors in their employ; to permit the inspection and transcript of such records by the State administrative agency and its authorized representatives; and, upon request, to furnish said agency with a sworn statement of the same. Employers shall further be required to post and maintain the notices regarding wage orders issued by the State administrative agency.

SEC. 7. Each minimum-wage law so enacted shall contain provisions for appeal to the courts on questions of law by persons aggrieved by the decisions of said agency. Said law shall also contain a provision to the effect that in no case shall wage orders or decrees entered under a previously existing law be nullified until the provisions of the law enacted in conformity herewith have become operative and until new wage orders covering the same occupations have been entered and made effective.

SEC. 8. Each minimum-wage law enacted in conformity herewith shall contain a saving clause to the effect that if any provisions of such law or its application be held invalid, the remainder of the law and its application elsewhere shall not be affected thereby.

SEC. 9. Mandatory fair-wage legislation now in effect in any of the signatory States, and such legislation in course of passage in any of such States as is in conformity with the provisions of this compact, is hereby declared to meet the minimum standards required by this compact.

SEC. 10. This compact as applied to minimum wage shall, when ratified by two or more States in accordance with the provisions of sec-

tion 6 of title II, be in full force and effect in the States so ratifying the same.

In witness whereof the Commissioners of the States of Connecticut, Maine, New Hampshire, New York, Rhode Island, and of the Commonwealths of Massachusetts and Pennsylvania have signed this compact in a single original, which shall be deposited in the archives of the Department of State of the United States of America at Washington, District of Columbia, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at Concord, New Hampshire, this twenty-ninth day of May, in the year of our Lord one thousand nine hundred and thirty-four.

(Signed by members of commissions and by delegates of the States of Connecticut, Maine, New Hampshire, New York, Rhode Island, and of the Commonwealths of Massachusetts and Pennsylvania.)

Approved, August 12, 1937.

## 24. CRIME CONTROL

The prevention or control of crime is among the matters clearly within the jurisdiction of each state, with little direct power in the national government. This worked fairly well in the earlier "horse-and-buggy" days, but with the development of the swifter means of travel, in particular, criminals found it relatively easy to flee from the scene of the crime into another state and thus escape punishment completely or seriously increase the difficulties of law enforcement. The crime problem has therefore become to a considerable extent an interstate or a national problem, and some attempts have been made to deal with it as such. The compact has been used to facilitate the establishment of common methods and machinery among the different states, and national legislation has been enacted to deal with various aspects of the problem to the full extent of federal power. For example, the problem of the stolen automobile resulted in the National Motor Vehicle Theft Act of 1919, and the kidnapping of the Lindbergh baby and others resulted in the National Anti-Kidnapping Act of 1932, generally called the Lindbergh Law.

### a. Crime Prevention Compact Act

[Act of June 6, 1934. *U. S. Statutes*, vol. 48, p. 909.]

The consent of Congress is hereby given to any two or more States to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and in the enforcement of their respective criminal laws and policies, and to establish such agencies, joint or otherwise, as they may deem desirable for making effective such agreements and compacts.



**b. Crime Prevention Compact**

[Text in *New Jersey Commission on Interstate Cooperation, Report No. 3* (Jan., 1938), pp. 32-34.]

**A COMPACT**

Entered into by and between all the States Signatory hereto, with the consent of the Congress of the United States of America, granted by an act entitled "An Act granting the consent of Congress to any two or more states to enter into agreements or compacts for cooperative effort and mutual assistance in the prevention of crime and for other purposes," effective June 6, 1934.

The contracting states solemnly agree :

(1) That it shall be competent for the duly constituted judicial and administrative authorities of a state party to this compact (herein called "sending state") to permit any person convicted of an offense within such state and placed on probation or released on parole to reside in any other state party to this compact (herein called "receiving state") while on probation or parole, if

(a) Such person is in fact a resident of or has his family residing within the receiving state and can obtain employment there;

(b) Though not a resident of the receiving state and not having his family residing there, the receiving state consents to such person's being sent there.

Before granting such permission, opportunity shall be granted to the receiving state to investigate the home and prospective employment of such person.

A resident of the receiving state, within the meaning of this section, is one who has been an actual inhabitant of such state continuously for more than one year prior to his coming to the sending state and has not resided within the sending state more than six continuous months immediately preceding the commission of the offense for which he has been convicted.

(2) That each receiving state will assume the duties of visitation of and supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees.

(3) That duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any person on probation or parole. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of

the person to be retaken. All legal requirements to obtain extradition of fugitives from justice are hereby expressly waived on the part of the states party hereto, as to such persons. The decision of the sending state to retake a person on probation or parole shall be conclusive upon and not reviewable within the receiving state: Provided, however, That if at the time when a state seeks to retake a probationer or parolee there should be pending against him within the receiving state any criminal charge, or he should be suspected of having committed within such a state a criminal offense, he shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense.

(4) That the duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states parties to this compact, without interference.

(5) That the governor of each state may designate an officer who, acting jointly with like officers of other contracting states, if and when appointed, shall promulgate such rules and regulations as may be deemed necessary to more effectively carry out the terms of this compact.

(6) That this compact shall become operative immediately upon its execution by any state as between it and any other state or states so executing. When executed it shall have the full force and effect of law within such state, the form of execution to be in accordance with the laws of the executing state.

(7) That this compact shall continue in force and remain binding upon each executing state until renounced by it. The duties and obligations hereunder of a renouncing state shall continue as to parolees or probationers residing therein at the time of withdrawal until retaken or finally discharged by the sending state. Renunciation of this compact shall be by the same authority which executed it, by sending six months' notice in writing of its intention to withdraw from the compact to the other states party hereto.

### c. "Lindbergh" Law

[*Code of the Laws of the United States* (1934 ed.), p. 756 (Title 18, ch. 9).]

§ 408a. Kidnaped persons; transportation, etc., of persons unlawfully detained. Whoever shall knowingly transport or cause to be transported, or aid or abet in transporting, in interstate or foreign commerce, any person who shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away by any means

whatsoever and held for ransom or reward or otherwise, except, in the case of a minor, by a parent thereof, shall, upon conviction, be punished (1) by death if the verdict of the jury shall so recommend, provided that the sentence of death shall not be imposed by the court if, prior to its imposition, the kidnaped person has been liberated unharmed, or (2) if the death penalty shall not apply nor be imposed the convicted person shall be punished by imprisonment in the penitentiary for such term of years as the court in its discretion shall determine: *Provided*, That the failure to release such person within seven days after he shall have been unlawfully seized, confined, inveigled, decoyed, kidnaped, abducted, or carried away shall create a presumption that such person has been transported in interstate or foreign commerce, but such presumption shall not be conclusive. (June 22, 1932, c. 271, § 1, 47 Stat. 326; May 18, 1934, c. 301, 48 Stat. 781.)

**§ 408b. Same; interstate or foreign commerce defined.** The term "interstate or foreign commerce," as used in section 408a of this title, shall include transportation from one State, Territory, or the District of Columbia to another State, Territory, or the District of Columbia, or to a foreign country, or from a foreign country to any State, Territory, or the District of Columbia. (June 22, 1932, c. 271, § 2, 47 Stat. 326; May 18, 1934, c. 301, 48 Stat. 782.)

**§ 408c. Same; conspiracy.** If two or more persons enter into an agreement, confederation, or conspiracy to violate the provisions of sections 408a and 408b of this title, and do any overt act toward carrying out such unlawful agreement, confederation, or conspiracy, such person or persons shall be punished in like manner as provided for by said sections. (June 22, 1932, c. 271, § 3, 47 Stat. 326; May 18, 1934, c. 301, 48 Stat. 782.)

**§ 408d. Threatening communications in interstate commerce.** Whoever, with intent to extort from any person, firm, association, or corporation any money or other thing of value, shall transmit in interstate commerce, by any means whatsoever, any threat (1) to injure the person, property, or reputation of any person, or the reputation of a deceased person, or (2) to kidnap any person, or (3) to accuse any person of a crime, or (4) containing any demand or request for a ransom or reward for the release of any kidnaped person, shall upon conviction be fined not more than \$5,000 or imprisoned not more than twenty years, or both: *Provided*, That the term "interstate commerce" shall include communication from one State, Territory, or the District of Columbia, to another State, Territory, or the District of Columbia. . . . (May 18, 1934, c. 300, 48 Stat. 781.)

d. Warning of President Roosevelt

[Veto Message of May 24, 1939. Text in *White House Press Releases*, May 24, 1939; also in *Congressional Record*, vol. 84, pt. 6, pp. 6081-6082.]

*To the Senate:*

I return herewith, without my approval, a bill (S.90) entitled "An Act To provide for the punishment of persons transporting stolen animals in interstate commerce, and for other purposes."

The bill proposes to make it a Federal offense to knowingly transport in interstate or foreign commerce any stolen cattle, hog, sheep, horse, or mule, or the carcass or hide or any part of the carcass or hide of any such stolen animal. The receipt of such stolen property would likewise be made a Federal offense.

I disapproved a similar bill after the adjournment of the first session of the 75th Congress.

An interesting and far-reaching problem is raised by this type of legislation.

How far does the Congress want to go in extending the Federal police power?

In recent years, with my hearty approval, the Congress has extended jurisdiction over serious criminal offenses, such as kidnapping and bank holdups, making it possible to apprehend such offenders on the theory that in all probability they would cross State lines.

We have also the National Stolen Property Act, which gives Federal jurisdiction in the case of major thefts, i.e., where the value of the property involved is \$5,000 or more.

This bill, however, extends this extension of jurisdiction to bring within its terms numerous offenses of the petty larceny type.

I am compelled, therefore, to ask the question: Why does the Federal Government extend its jurisdiction over any stolen cattle, hog, sheep, horse, mule or the carcass or hide of any such stolen animal, and, at the same time, leave out all other forms of stolen property of comparatively low value?

Why not by the same theory extend Federal jurisdiction to the theft of all other kinds of personal property—property of a value which makes the theft a misdemeanor rather than a crime?

I am wondering if the Congress realizes that the logic of the situation created by this bill would rather definitely encroach on the police power of the several States.

Furthermore, if this Act should go into effect, it would mean an

additional appropriation to the Department of Justice of about \$200,000 a year—that is if the Act is to be properly enforced.

If this type of legislation is extended to all other forms of personal property, additional large sums would have to be appropriated to the Department of Justice.

I am, therefore, disapproving this bill, with the hope that the Congress will seriously consider the ultimate implications of legislation of this type.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,  
May 24, 1939.

## 25. COUNCIL OF STATE GOVERNMENTS

One of the most serious defects in our federal system has been the lack of adequate machinery for promoting harmonious action among the states and for securing their cooperation with respect to common problems. In 1926, under the leadership of Henry W. Toll, then a state senator in Colorado, the American Legislators' Association was organized for the purpose of facilitating exchange of information between members of the various state legislatures. Within a few years this organization proved very successful, established permanent headquarters at Chicago in close association with many other organizations of state and local government officials, published a journal called *State Government*, set up an Interstate Reference Bureau, and sponsored numerous interstate conferences. In 1935 a broader organization was established, called the Council of State Governments, for the purpose of coordinating, expanding, and making more effective the various interstate organizations and activities already under way. Although thus begun as an unofficial agency, the various state governments found it so useful that by the end of 1939 most of the 48 states had joined it and were appropriating money for its support. The Council of State Governments has therefore become a semi-official agency for interstate cooperation and has carried on a wide variety of activities. Among the important accomplishments has been the establishment in most of the states (41 in 1939) of official commissions, generally following a model plan proposed by the Council, to be continuously responsible for encouraging friendly contacts and for securing cooperation with other states on matters of common concern. As a result, much progress has been made in respect to many troublesome questions of interstate relations, such as crime, taxation, and trade.

### a. Illinois Commission on Interstate Cooperation

[Act of July 6, 1937, as amended by Act of July 11, 1939. *Laws of Illinois*, 1937, pp. 203–205; *ibid.*, 1939, pp. 1149–1150.]

*An Act to establish an unpaid Commission on Inter-governmental Cooperation*

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

Section 1. The Illinois Commission on Intergovernmental Cooperation [created in 1937 for two years only] is hereby continued. It shall consist of twelve members to be appointed as follows:

(a) Five members of the Senate to be appointed by the President thereof, upon the advice of the Executive Committee of the Senate;

(b) Five members of the House of Representatives to be appointed by the Speaker of the House;

(c) Two administrative officers or employees to be appointed by the Governor.

The Governor, the Director of the Department of Finance, the Chairman of the State Planning Commission and the Attorney General shall be ex-officio members of the Commission during the terms of their respective offices.

The President of the Senate and the Speaker of the House of Representatives shall be ex-officio honorary non-voting members of the Commission during their terms as President of the Senate or Speaker of the House of Representatives.

The terms of all appointive members shall expire at twelve noon on the first day of July in each odd-numbered year. Their successors shall be appointed before the final adjournment of each regular General Assembly.

§ 2. It shall be the function of this Commission:

(1) To carry forward the participation of this State as a member of the Council of State Governments.

(2) To encourage and assist the legislative, executive, administrative and judicial officials and employees of this State to develop and maintain friendly contact by correspondence, by conference, and otherwise, with officials and employees of the other States, of the Federal Government, and of local units of government.

(3) To endeavor to advance cooperation between this State and other units of government whenever it seems advisable to do so by formulating proposals for, and by facilitating:

(a) The adoption of compacts.

(b) The enactment of uniform or reciprocal statutes.

(c) The adoption of uniform or reciprocal administrative rules and regulations.

(d) The informal cooperation of governmental offices with one another.

(e) The personal cooperation of governmental officials and employees with one another individually.



- (f) The interchange and clearance of research and information.
- (g) Any other suitable process, and
- (h) To do all such acts as will enable this State to do its part in forming a more perfect union among the various governments in the United States and in developing the Council of State Governments for that purpose.

§ 3. The Commission shall establish such committees as it deems advisable, in order that they may confer and formulate proposals concerning effective means to secure intergovernmental harmony, and may perform other functions for the Commission in obedience to its decision. Subject to the approval of the Commission, the member or members of each such committee shall be appointed by the Chairman of the Commission. State officials or employees who are not members of the Commission on Intergovernmental Cooperation may be appointed as members to any such committee, but private citizens holding no governmental position in this State shall not be eligible. The Commission may provide such other rules as it considers appropriate concerning the membership and the functioning of any such committee. The Commission may provide for advisory boards for itself and for its various committees, and may authorize private citizens to serve on such boards.

§ 4. The Commission shall report to the Governor and to the Legislature within fifteen days after the convening of each General Assembly, and at such other times as it deems appropriate. Its members and the members of all committees which it establishes shall serve without compensation for such service, but they shall be paid their necessary expenses in carrying out their obligations under this Act. The Commission may employ a secretary and a stenographer, it may incur such other expenses as may be necessary for the proper performance of its duties, and it may, by contributions to the Council of State Governments, participate with other states in maintaining the said Council's district and central secretariats, and its other governmental services.

. . . . .

§ 8. The sum of three thousand dollars (\$3000), or so much thereof as may be necessary is appropriated to the Illinois Commission on Intergovernmental Cooperation for the purpose of paying all expenses of said Commission in administering this Act.

**b. Interstate Trade Barriers**

[*Proceedings of National Conference on Interstate Trade Barriers, 1939*  
(published by Council of State Governments), pp. 115-118.]

RESOLUTIONS

ADOPTED BY THE CONFERENCE

*Resolution I*

WHEREAS the preamble to the Constitution of the United States of America reads:

"We, the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the United States of America."

AND WHEREAS it is felt that we here, through the efforts of this Conference, must keep the faith inherent within that great keystone of our democracy, our Constitution, the purpose of which is so clearly and inspirationally set forth in the Preamble thereto;

NOW THEREFORE be it resolved that we do our utmost, individually and collectively, to prevent any and all state actions that may run contrary to the governmental philosophy so adequately expressed in the above quoted Preamble.

*Resolution II*

WHEREAS the interruption of the free flow of commerce among the several states of the United States is detrimental to the economic welfare of the country, and

WHEREAS the increase of interstate trade barriers and the passage of discriminatory legislation by the states has resulted in the adoption of retaliatory legislation, in contravention of the spirit of the Union and the welfare of the people thereof, and

WHEREAS these practices by the several states place additional burdens upon the consumer and as such must inevitably postpone the return of our national prosperity and result in lower standards of living in this country,

NOW THEREFORE BE IT RESOLVED that the National Conference on Interstate Trade Barriers declares itself to be unalterably opposed to the erection of these discriminatory trade barriers, and

BE IT FURTHER RESOLVED that this Conference recommends that the

states return to the traditional American policy of free trade among the states, in order that the consumers and producers of the Nation may buy and sell without legal discrimination, either as to the place of origin of goods, the method of transportation or the efficiency of the producer.

### *Resolution III*

WHEREAS the National Conference on Interstate Trade Barriers has considered at length the barriers which obstruct the free flow of commerce throughout the nation in agriculture, industry, labor and other fields, and

WHEREAS a carefully prepared long-term program must be formulated if this threat to our national economy is to be arrested,

NOW THEREFORE BE IT RESOLVED that this Conference request the Council of State Governments, through its Commissions on Interstate Cooperation, to continue the important work of this Conference by:

1. Discouraging the adoption of any retaliatory legislation by states which feel themselves aggrieved by the legislation of their neighbors.
2. Encouraging the repeal of trade barrier legislation which may have already been adopted by the several states.
3. Encouraging the enactment of uniform laws, and the adoption of reciprocal agreements, which have for their aim the reduction of trade barriers between the states.
4. Initiating regional hearings throughout the United States, such hearings to be officially called by the Commissions on Interstate Cooperation in conjunction with the Council of State Governments, in order to follow through the recommendations made by this Conference.
5. Undertaking surveys and factual studies as proposed by this Conference or the Commissions on Interstate Cooperation.

BE IT FURTHER RESOLVED that in order to provide facilities for the conciliation of specific differences between states resulting from trade barriers, this Conference recommends that the state which considers itself adversely affected by the legislation of another state petition the Council of State Governments to use its good offices to arrange a conference with the state which has enacted the offending legislation before taking any other action.

### *Resolution IV*

RESOLVED that this Conference urges that *in each State*, in order to assist the Governor, legislators and administrative officials thereof to eliminate the laws of such state as constitute interstate barriers, the Com-

mission on Interstate Cooperation or some other appropriate agency of the state shall prepare and disseminate a survey of statutory provisions which might under some circumstances operate as barriers; and that in preparing this study, each Commission shall consider the digest relating to laws of its respective state contained in the digest prepared by the WPA Marketing Laws Survey, and in the series of Trade Barrier Bulletins prepared by the Council of State Governments. Among the Council's Bulletins and the Reports of the Marketing Laws Survey which this Conference thus recommends for consideration are those relating to the following specific subjects, which, in the opinion of this Conference, deserve especial attention at this time:

Public Purchase Preference Laws

Margarine Excise Taxes

Ports-of-Entry

State Use Taxes

State Laws concerning Peddlers

Motor Vehicle Laws

Agricultural Quarantines

State Laws concerning Dairy Products

State Laws concerning Out-of-State Alcoholic Beverages and more especially concerning Wine, Beers, and Distilled Spirits.

#### *Resolution V*

BE IT RESOLVED that the Central Secretariat of the Council of State Governments be requested to prepare and distribute to the Commissions on Interstate Cooperation of the several states, a study designed to determine whether it is feasible and desirable to use interstate compacts or agreements to facilitate and implement the states' action in the removal and prevention of interstate trade barriers, and whether Federal consent to such compacts and agreements is necessary, and, if deemed advisable, to include in the report of this study drafts for such compacts and a draft for congressional consent thereto.

#### *Resolution VI*

BE IT RESOLVED that this Conference on Interstate Trade Barriers of the Council of State Governments approves the action taken by the Congress of the United States in conducting a general investigation of all freight rates and urges its continued effort to arrive at an equitable freight rate basis for the entire United States.

*Resolution VII*

WHEREAS a number of agencies of the governments of the several States and of the Federal Government have cooperated in the organization and preparation of the National Conference on Interstate Trade Barriers, and

WHEREAS the success of this Conference is due in no small measure to the time and effort devoted by the personnel of these agencies in assisting the Council of State Governments,

THEREFORE BE IT RESOLVED that the National Conference on Interstate Trade Barriers does hereby express its sincere thanks to:

The Federation of Tax Administrators

The National Association of State Agricultural Commissioners, Directors, and Secretaries

The Marketing Laws Survey of the Works Progress Administration

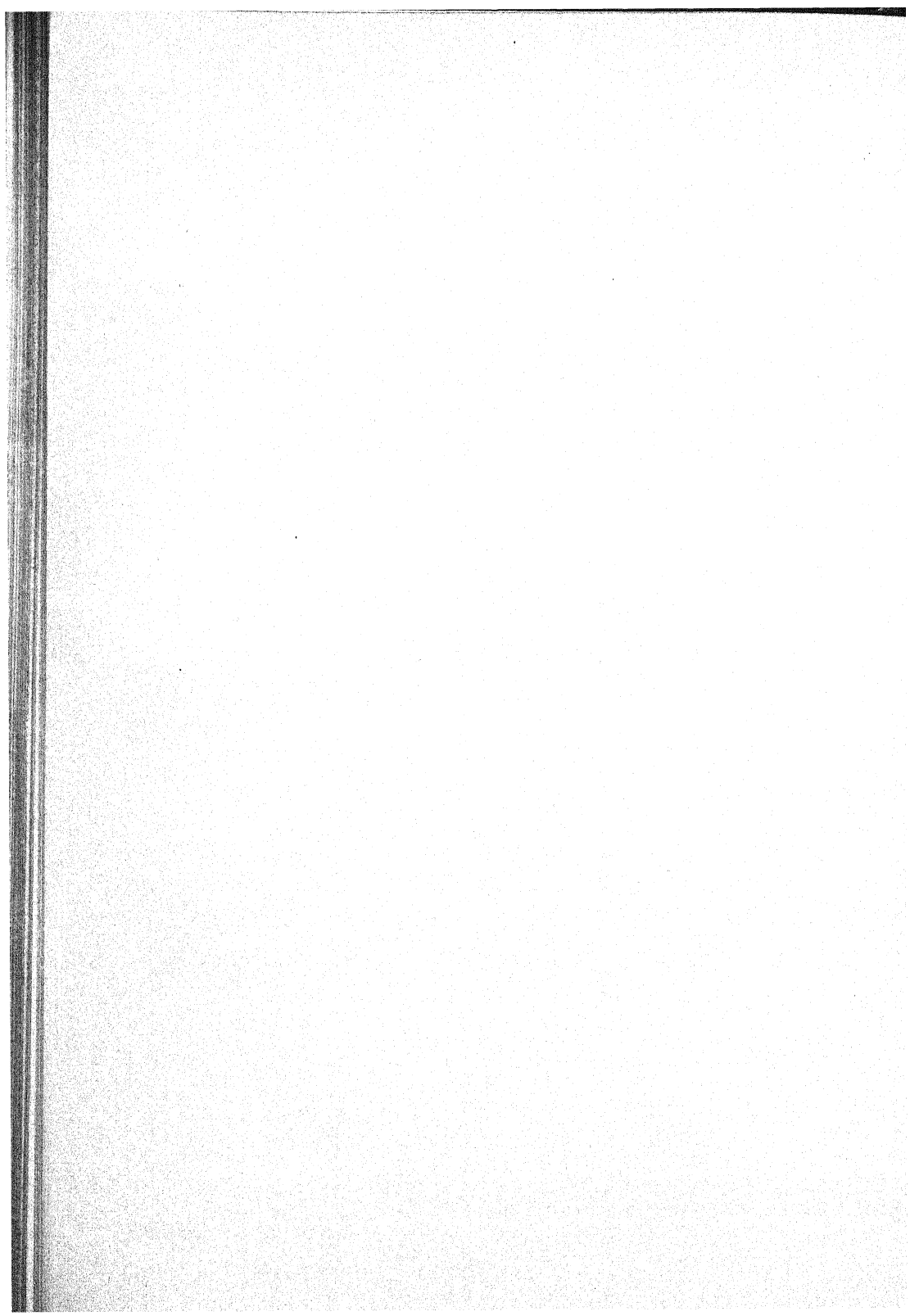
The Department of Agriculture

The Department of Commerce

Mr. Frank Bane, Executive Director, Council of State Governments.

PART II  
POPULAR CONTROL





## CHAPTER V

### THE PARTY SYSTEM

#### 26. IMPORTANCE OF THE POLITICAL PARTY

There is no provision in the national Constitution for political parties, and apparently the founders of our government felt that parties were not only unnecessary but undesirable. The party system has, nevertheless, become thoroughly established as a political institution, although there may still be differences of opinion as to its usefulness.

##### a. View of Washington

[Farewell Address, Sept. 17, 1796. *Writings of George Washington* (Ford ed., published by G. P. Putnam's Sons), vol. XIII, pp. 297-305.]

. . . . .

To the efficacy and permanency of your Union, a Government for the whole is indispensable.—No alliances however strict between the parts can be an adequate substitute.—They must inevitably experience the infractions and interruptions which all alliances in all times have experienced.—Sensible of this momentous truth, you have improved upon your first essay, by the adoption of a Constitution of Government, better calculated than your former for an intimate Union, and for the efficacious management of your common concerns.—This government, the offspring of our own choice uninfluenced and unawed, adopted upon full investigation and mature deliberation, completely free in its principles, in the distribution of its powers, uniting security with energy, and containing within itself a provision for its own amendment, has a just claim to your confidence and your support.—Respect for its authority, compliance with its Laws, acquiescence in its measures, are duties enjoined by the fundamental maxims of true Liberty.—The basis of our political systems is the right of the people to make and to alter their Constitutions of Government.—But the Constitution which at any time exists, 'till changed by an explicit and authentic act of the whole People, is sacredly obligatory upon all.—The very idea of the power and the right of the People to establish Government, presupposes the duty of every individual to obey the established Government.

All obstructions to the execution of the Laws, all combinations and as-

sociations, under whatever plausible character, with the real design to direct, controul, counteract, or awe the regular deliberation and action of the constituted authorities, are destructive of this fundamental principle, and of fatal tendency.—They serve to organize faction, to give it an artificial and extraordinary force—to put in the place of the delegated will of the Nation, the will of a party;—often a small but artful and enterprizing minority of the community;—and, according to the alternate triumphs of different parties, to make the public administration the mirror of the ill-concerted and incongruous projects of faction, rather than the organ of consistent and wholesome plans digested by common councils, and modified by mutual interests.—However combinations or associations of the above description may now and then answer popular ends, they are likely, in the course of time and things, to become potent engines, by which cunning, ambitious, and unprincipled men will be enabled to subvert the Power of the People and to usurp for themselves the reins of Government; destroying afterwards the very engines, which have lifted them to unjust dominion.—

Towards the preservation of your Government and the permanency of your present happy state, it is requisite, not only that you steadily discountenance irregular oppositions to its acknowledged authority, but also that you resist with care the spirit of innovation upon its principles, however specious the pretexs.—One method of assault may be to effect, in the forms of the Constitution, alterations which will impair the energy of the system, and thus to undermine what cannot be directly overthrown.—In all the changes to which you may be invited, remember that time and habit are at least as necessary to fix the true character of Governments, as of other human institutions—that experience is the surest standard, by which to test the real tendency of the existing Constitution of a Country—that facility in changes upon the credit of mere hypothesis and opinion exposes to perpetual change, from the endless variety of hypothesis and opinion:—and remember, especially, that, for the efficient management of your common interests, in a country so extensive as ours, a Government of as much vigor as is consistent with the perfect security of Liberty is indispensable.—Liberty itself will find in such a Government, with powers properly distributed and adjusted, its surest Guardian.—It is, indeed, little else than a name, where the Government is too feeble to withstand the enterprises of faction, to confine each member of the society within the limits prescribed by the laws, and to maintain all in the secure and tranquil enjoyment of the rights of person and property.

I have already intimated to you the danger of Parties in the State, with particular reference to the founding of them on Geographical discrimina-

tions.—Let me now take a more comprehensive view, and warn you in the most solemn manner against the baneful effects of the Spirit of Party, generally.

This Spirit, unfortunately, is inseparable from our nature, having its root in the strongest passions of the human mind.—It exists under different shapes in all Governments, more or less stifled, controuled, or repressed; but, in those of the popular form, it is seen in its greatest rankness, and is truly their worst enemy.—

The alternate domination of one faction over another, sharpened by the spirit of revenge natural to party dissension, which in different ages and countries has perpetrated the most horrid enormities, is itself a frightful despotism.—But this leads at length to a more formal and permanent despotism.—The disorders and miseries, which result, gradually incline the minds of men to seek security and repose in the absolute power of an Individual: and sooner or later the chief of some prevailing faction, more able or more fortunate than his competitors, turns this disposition to the purposes of his own elevation, on the ruins of Public Liberty.

Without looking forward to an extremity of this kind, (which nevertheless ought not to be entirely out of sight), the common and continual mischiefs of the spirit of Party are sufficient to make it the interest and duty of a wise People to discourage and restrain it.—

It serves always to distract the Public Councils, and enfeeble the Public administration.—It agitates the community with ill founded jealousies and false alarms, kindles the animosity of one part against another, foment occasionally riot and insurrection.—It opens the doors to foreign influence and corruption, which find a facilitated access to the Government itself through the channels of party passions. Thus the policy and the will of one country, are subjected to the policy and will of another.

There is an opinion that parties in free countries are useful checks upon the Administration of the Government, and serve to keep alive the Spirit of Liberty.—This within certain limits is probably true—and in Governments of a Monarchical cast, Patriotism may look with indulgence, if not with favour, upon the spirit of party.—But in those of the popular character, in Governments purely elective, it is a spirit not to be encouraged.—From their natural tendency, it is certain there will always be enough of that spirit for every salutary purpose,—and there being constant danger of excess, the effort ought to be, by force of public opinion, to mitigate and assuage it.—A fire not to be quenched; it demands a uniform vigilance to prevent its bursting into a flame, lest instead of warming, it should consume.

**b. View of Coolidge**

[Inaugural Address, Mar. 4, 1925. Text in *N. Y. Times*, Mar. 5, 1925.]

Since its very outset it has been found necessary to conduct our government by means of political parties. That system would not have survived from generation to generation if it had not been fundamentally sound and provided the best instrumentalities for the most complete expression of the popular will.

It is not necessary to claim that it has always worked perfectly. It is enough to know that nothing better has been devised.

No one would deny that there should be full and free expression and an opportunity for independence of action within the party. There is no salvation in a narrow and bigoted partisanship. But if there is to be responsible party government the party label must mean something more than a mere device for securing office.

Unless those who are elected under the same party designation are willing to assume sufficient responsibility and exhibit sufficient loyalty and coherence so that they can cooperate with each other in the support of the broad general principles of the party platform the election is merely a mockery, no decision is made at the polls, and there is no representation of the popular will.

Common honesty and good faith with the people who support a party at the polls require that party when it enters office to assume the control of that portion of the government to which it has been elected. Any other course is bad faith and a violation of the party pledges.

When the country has bestowed its confidence on a party by making it a majority in congress it has a right to expect such unity of action as will make the party majority an effective instrument of government.

**27. LEGAL POSITION OF THE POLITICAL PARTY**

The political party has played an important part in government ever since our system was put into operation, but for a long time its position was that of an extra-legal institution. Not until 1866 was the party recognized at all in the statutes of any state. In that year laws were enacted in California and New York penalizing the worst abuses in connection with party caucuses and conventions, offering protection against fraudulent practices, but still considering the party altogether a private or voluntary association. By this time, however, every state in the Union has legislation dealing with the political party and regulating its practices in more or less detail. Some states even have constitutional provisions relating to these matters. This change from an extra-legal to a completely legalized institution has not, unfortunately, made the party into a genuine instrument of democracy. The extraordinary part played by the party organization or "boss" and the extent of

"invisible government" carried on, were pointed out by so eminent and conservative a statesman as Elihu Root, in speaking to the New York Constitutional Convention of 1915, of which he was president.

#### a. Preamble to Oregon Primary Election Law of 1905

[*General Laws of Oregon, 1905*, pp. 8-9.]

Under our form of government, political parties are useful and necessary at the present time. It is necessary for the public welfare and safety that every practical guaranty shall be provided by law to assure the people generally as well as the members of the several parties, that political parties shall be fairly, freely and honestly conducted, in appearance as well as in fact. The method of naming candidates for elective public offices by political parties and voluntary political organizations is the best plan yet found for placing before the people the names of qualified and worthy citizens from whom the electors may choose the officers of our government. The government of our State by its electors and the government of a political party by its members are rightfully based on the same general principles. Every political party and every voluntary political organization has the same right to be protected from the interference of persons who are not identified with it as its known and publicly avowed members, that the government of the States has to protect itself from the interference of persons who are not known and registered as its electors. It is as great a wrong to the people, as well as to the members of a political party, for one who is not known to be one of its members to vote or take any part at any election or other proceedings of such political party, as it is for one who is not a qualified and registered elector to vote at any State election or take any part in the business of the State. Every political party and voluntary political organization is rightfully entitled to the sole and exclusive use of every word of its official name. The people of the State and the members of every political party and voluntary political organization are rightfully entitled to know that every person who offers to take any part in the affairs or business of any political party or voluntary political organization in the State is in good faith a member of such party. The reason for the law which requires a secret ballot when all the electors choose their officers, equally requires a secret ballot when the members of a party choose their candidates for public office. It is as necessary for the preservation of the public welfare and safety that there shall be a free and fair vote and an honest count as well as a secret ballot at primary elections, as it is that there shall be a free and fair vote and an honest count in addition to the secret



ballot at all elections of public officers. All qualified electors who wish to serve the people in an elective public office are rightfully entitled to equal opportunities under the law.

The purpose of this law is better to secure and to preserve the rights of political parties and voluntary political organizations, and of their members and candidates, and especially of the rights above stated.

### b. Speech of Elihu Root

[*Revised Record, New York State Constitutional Convention, 1915, vol. IV, pp. 3501-3502.*]

We talk about the government of the constitution. We have spent many days in discussing the powers of this and that and the other officer. What is the government of this state? What has it been during the forty years of my acquaintance with it? The government of the constitution? Oh, no; not half the time, or halfway. When I ask what do the people find wrong in our state government, my mind goes back to those periodic fits of public rage in which the people rouse up and tear down the political leader, first of one party and then of the other party. It goes on to the public feeling of resentment against the control of party organizations, of both parties and of all parties.

Now, I treat this subject in my own mind not as a personal question to any man. I am talking about the system. From the days of Fenton and Conkling and Arthur and Cornell and Platt, from the days of David B. Hill, down to the present time the government of the state has presented two different lines of activity, one of the constitutional and statutory officers of the state, and the other of the party leaders—they call them party bosses. They call the system—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call "invisible government." For I don't remember how many years, Mr. Conkling was the supreme ruler in this state; the governor did not count, the legislatures did not count; comptrollers and secretaries of state and what not did not count. It was what Mr. Conkling said, and in a great outburst of public rage he was pulled down.

Then Mr. Platt ruled the state; for nigh upon twenty years he ruled it. It was not the governor; it was not the legislature; it was not any elected officers; it was Mr. Platt. And the Capitol was not here; it was at 49 Broadway; Mr. Platt and his lieutenants. It makes no difference what name you give, whether you call it Fenton or Conkling or Cornell or Arthur or Platt, or by the names of men now living. The ruler of the state during the greater part of the forty years of my acquaintance with

the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and breadth of this state a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. . . . But it is all wrong. It is all wrong that a government not authorized by the people should be continued superior to the government that is authorized by the people.

### c. Regulation of State Party Organization

[Illinois Primary Law of 1927, as amended 1935, 1936, and 1939. *Illinois Election Laws in Force July 1, 1939*, pp. 130-137, 151-152.]

## ARTICLE XXV

### PRIMARY ELECTIONS—GENERAL LAW NOMINATION OF CANDIDATES BY POLITICAL PARTIES

1. What Candidates Nominated—Committeemen—Exceptions—Proviso.] [§ 365, Ch. 46, R. S.] The nomination of all candidates for all elective State, congressional, county (including county and probate judge), city (including officers of the municipal court of Chicago), village and town and municipal officers, clerks of the Appellate Courts, trustees of sanitary districts, township officers in townships of over 25,000 population co-extensive with cities other than cities under the commission form of municipal government, township officers in townships of 7,500 or more population adjacent to cities of 50,000 or more population, incorporated towns or villages, and for the election of precinct, township, ward and State central committeemen, and delegates and alternate delegates to the National nominating conventions by all political parties, as defined in section 2 of this Act, shall be made in the manner provided in this Act, and not otherwise; *Provided*, the nomination of candidates for electors of President and Vice-President of the United States, and trustees of the University of Illinois, and the election of delegates and alternate delegates-at-large to National nominating conventions, shall be made only in the manner provided for in section 10 of this Act: *And, provided further*, that this Act shall not apply to the nomination of Circuit and Supreme Court judges or judges of the Superior Court of Cook County, or to school elections and township elections, other than in townships of over 25,000 population co-extensive with incorporated towns, villages or cities not under the commission form of

municipal government, or townships of less than 7,500 adjacent to a city of 50,000 or more population, or to the nomination of park commissioners in park districts organized under an Act entitled, "An Act to provide for the organization of park districts and the transfer of submerged lands to those bordering on navigable bodies of water," approved June 24, 1895, in force July 1, 1895, as subsequently amended, or to the nomination of officers of cities and villages organized under special charters, or to nomination of municipal officers for cities, villages and incorporated towns with a population of 5,000 or less. The words, "township officers," or "township offices," shall be construed, when used in this Act, to include supervisors and assistant supervisors. [Amended by Act filed July 26, 1939.]

**2. Political Party Defined.]** [§ 366, Ch. 46, R. S.] A political party which at the general election for State and county officers then next preceding a primary, polled more than 5 per cent. of the entire vote cast in the State, is hereby declared to be a political party within the State, and shall nominate all candidates provided for in this Act under the provisions hereof, and shall elect precinct, township, ward and State central committeemen as herein provided.

[Then follow similar definitions of a political party within the congressional district, county, city, village, town, or other political subdivision, except townships and school districts.]

[Amended by Act approved July 9, 1935.]

**3. Party Vote—How Determined.]** [§ 367, Ch. 46, R. S.] In determining the total vote of a political party, whenever required by this Act, the test shall be the total vote cast by such political party for its candidate who received the greatest number of votes; *provided however*, that in applying this section to the vote cast for any candidate for an office for which cumulative voting is permitted, the total vote cast for such candidate shall be divided by that number which equals the greatest number of votes that could lawfully be cast for such candidate by one elector.

. . . . .

**8. Committees—Central or Managing.]** [§ 372, Ch. 46, R. S.] The following committees shall constitute the central or managing committees of each political party, viz: A State central committee, a congressional committee for each congressional district, a county central committee for each county, a municipal central committee for each city, town or village, a ward committeeman for each ward in cities containing a population of 500,000 or more. A township committeeman for each

township or part of a township that lies outside of cities having a population of 200,000 or more, in counties having a population of 500,000 or more, a precinct committeeman for each precinct in counties having a population of less than 500,000. [Amended by Act approved July 9, 1935.]

9. Committees—Composition—Organization—Powers, etc.—State Central Committee—Precinct Committeeman—County Central Committee—Congressional Committee—Municipal Central Committee—Powers and Duties of Committees—Existing Party Committees Recognized.] [§ 373, Ch. 46, R. S.] The State central committee shall be composed of one member from each congressional district in the State and shall be elected as follows:

(a) At the primary held on the second Tuesday in April, 1928, and at the April primary held every two years thereafter, each primary elector may vote for one candidate of his party for member of the State central committee for the congressional district in which he resides. The State central committee of each political party shall be composed of members elected from the several congressional districts of the State, as herein provided, and of no other person or persons whomsoever. The members of the State central committee shall, within thirty days after their election, meet in the city of Springfield and organize by electing from among their own number a chairman, and may at such time elect such officers from among their own number or otherwise, as they may deem necessary or expedient. The outgoing chairman of the State central committee of the party shall, ten days before the meeting, notify each member of the State central committee elected at the primary of the time and place of such meeting. In the organization and proceedings of the State central committee, each State central committeeman shall have one vote for each ballot voted in his congressional district by the primary electors of his party at the primary at which he was elected.

(b) At the primary held on the second Tuesday in April, A.D. 1936, and at the April primary held every four years thereafter, each primary elector in cities having a population of 200,000 or over, may vote for one candidate of his party in his ward for ward committeeman. Each candidate for ward committeeman must be a resident of and in the ward where he seeks to be elected ward committeeman. The one having the highest number of votes shall be such ward committeeman of such party for such ward. At the primary election held on the second Tuesday in April, A.D. 1938, and every four years thereafter, each primary elector in counties containing a population of 500,000 or more, outside of cities containing a population of 200,000 or more, may vote for one candidate

of his party for township committeeman. Each candidate for township committeeman, must be a resident of and in the township or part of a township (which lies outside of a city having a population of 200,000 or more, in counties containing a population of 500,000 or more), and in which township or part of a township he seeks to be elected township committeeman. The one having the highest number of votes shall be such township committeeman of such party for such township or part of a township. At the primary held on the second Tuesday in April, A.D. 1928 and at the April primary held every two years thereafter, each primary elector, except in counties having a population of 500,000 or over, may vote for one candidate of his party in his precinct for precinct committeeman. Each candidate for precinct committeeman must be a bona fide resident of the precinct where he seeks to be elected precinct committeeman. The one having the highest number of votes shall be such precinct committeeman of such party for such precinct. The official returns of the primary shall show the name of the committeeman of each political party.

All State central committeemen, and precinct committeemen elected under the provisions of this Act, shall continue as such committeemen until the date of the April primary, to be held two (2) years after their election and all ward committeemen shall continue as such committeemen until the date of April primary to be held four (4) years after their election.

All township committeemen elected under the provisions of this Act at the primary held on the second Tuesday in April, 1936, shall continue as such committeemen until the date of the April primary in 1938. All township committeemen elected under the provisions of this Act at the primary held on the second Tuesday in April, 1938, and thereafter, shall continue as such committeemen until the date of the April primary to be held four (4) years after their election.

(c) The county central committee of each political party in each county, shall consist of the various township committeemen, precinct committeemen and ward committeemen, if any, of such party in the county. In the organization and proceedings of the county central committee, each precinct committeeman shall have one vote for each ballot voted in his precinct by the primary electors of his party at the primary at which he was elected; each township committeeman shall have one vote for each ballot voted in his township or part of a township as the case may be by the primary electors of his party at the primary election held on the second Tuesday of April immediately preceding the meeting of the county central committee; and in the organization and proceedings

of the county central committee, each ward committeeman shall have one vote for each ballot voted in his ward by the primary electors of his party at the primary election held on the second Tuesday of April immediately preceding the meeting of the county central committee.

(d) The congressional committee of each party in each congressional district shall be composed of the chairmen of the county central committees of the counties composing the congressional district, excepting that in congressional districts, wholly within the territorial limits of one county, or partly within two or more counties, but not coterminous with the county lines of all of such counties, the precinct committeemen, township committeemen and the ward committeemen, if any, of the party representing the precincts within the limits of the congressional district, shall compose the congressional committee.

In the organization proceedings of congressional committees, composed of precinct committeemen and/or township committeemen and/or ward committeemen, each precinct committeeman shall have one vote for each ballot voted in his precinct by the primary electors of his party at the primary at which he was elected, each township committeeman shall have one vote for each ballot voted in his township or part of a township as the case may be by the primary electors of his party at the primary election held on the second Tuesday of April immediately preceding the meeting of the congressional committee, and each ward committeeman shall have one vote for each ballot voted in each precinct of his ward located in such congressional district by the primary electors of his party at the primary election held on the second Tuesday of April immediately preceding the meeting of the congressional committee; and in the organization and proceedings of congressional committees composed of the chairmen of the county central committees of the counties within such district, each chairman of such county central committee shall have one vote for each ballot voted in his county by the primary electors of his party at the primary election held on the second Tuesday of April immediately preceding the meeting of the congressional committee.

(e) The municipal central committee of each political party shall be composed of the precinct, township or ward committeemen, as the case may be, of such party representing the precincts or wards, embraced in such city, town or village. The voting strength of each precinct, township or ward committeeman on the municipal central committee shall be the same as his voting strength on the county central committee.

(f) Each committee and its officers shall have the powers usually exercised by such committees and by the officers thereof, not inconsistent with the provisions of this Act. The several committees herein pro-



vided for shall not have power to delegate any of their powers, or functions to any other person, officer or committee, but this shall not be construed to prevent a committee from appointing from its own membership proper and necessary subcommittees.

(g) The various political party committees now in existence are hereby recognized and shall exercise the powers and perform the duties herein prescribed, until, but only until, committeemen are chosen in accordance with the provisions of this Act. [As amended by Act approved July 2, 1936.]

**10. Convention Dates—Organization—Delegates—(a) County Conventions—(b) (c) State Conventions—(d) Convention Functions—(e) Call for State Conventions—(f) Representation of Precinct Committeemen—(g) Convention Officers—Term (h) Special Committee Meeting.]** [§ 374, Ch. 46, R. S.] (a) On the second Monday next succeeding the April primary, at which committeemen are elected, the county central committee of each political party shall meet at the county seat of the proper county and proceed to organize by electing from its own number a chairman and either from its own number, or otherwise, such other officers as said committee may deem necessary or expedient. Such meeting of the county central committee shall be known as the county convention. The county convention of each political party shall choose delegates to the State convention of its party; but in any county having within its limits any city having a population of 200,000 or over the delegates from such city shall be chosen by wards, the ward committeemen from the respective wards choosing the number of delegates to which such ward is entitled on the basis prescribed in paragraph (e) of this section, such delegates to be members of the delegation to the State convention from such county. In all counties containing a population of 500,000 or more outside of cities having a population of 200,000 or more, the delegates from each of the townships or parts of townships as the case may be shall be chosen by townships or parts of townships as the case may be, the township committeemen from the respective townships or parts of townships as the case may be choosing the number of delegates to which such townships or parts of townships as the case may be are entitled, on the basis prescribed in paragraph (e) of this section, such delegates to be members of the delegation to the State convention from such county.

(b) All State conventions shall be held on the first Friday after the second Monday next succeeding the April primary at which committeemen are elected. The State convention of each political party shall have power to make nominations of candidates of its political party for the

electors of President and Vice-President of the United States and for Trustees of the University of Illinois, and to adopt any party platform, and to choose and select delegates and alternate delegates at large to National nominating conventions.

(c) The chairman and secretary of each State convention shall, within two days thereafter, transmit to the Secretary of State of this State a certificate setting forth the names and addresses of all persons nominated by such State convention for electors of President and Vice-President of the United States, and for Trustees of the University of Illinois, and for delegates and alternate delegates at large to National nominating conventions; and the names of such candidates so chosen by such State convention for electors of President and Vice-President of the United States, and Trustees of the University of Illinois shall be caused by the Secretary of State to be printed upon the official ballot at the general election, in the manner required by law, and shall be certified to the various county clerks of the proper counties in the manner as provided in section 59 of this Act for the certifying of the names of persons nominated by any party for State offices; *provided*, that if the general election laws of this State prescribe that the names of such electors be not printed on the ballot, then the names of such electors shall be certified in such manner as may be by such general law prescribed.

(d) Each convention may perform all other functions inherent to such political organization and not inconsistent with this Act.

(e) At least thirty-three (33) days before the April primary at which committeemen are elected, the chairman of the State committee of each political party shall file in the office of the county clerk in each county of the State a call for the State convention. Said call shall state, among other things, the time and place (designating the building or hall) for holding the State convention. Such call shall be signed by the chairman and attested by the secretary of the committee. In such convention each county shall be entitled to one delegate for each five hundred (500) ballots voted by the primary electors of said party in such county at the April primary to be held next after the issuance of such call; and if in such county, less than 500 ballots are so voted or if the number of ballots so voted is not exactly a multiple of 500, there shall be one delegate for such group which is less than 500, or for such group representing the number of votes over the multiple of 500, which delegate shall have one five-hundredths ( $1/500$ ) of one vote for each primary vote so represented by him. The call for such convention shall set forth this paragraph (e) of section 10 in full and shall direct that the number of delegates to be chosen be calculated in compliance herewith and that such

number of delegates be chosen. . . . [Amended by Act approved July 9, 1935.]

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43. **Qualifications of Voters.]** [§ 407, Ch. 46, R. S.] Every person having resided in this state one year, in the county ninety days, and in the precinct thirty days next preceding any primary therein who shall be a citizen of the United States above the age of twenty-one years, shall be entitled to vote at such primary.

The following regulations shall be applicable to primaries:

No person shall be entitled to vote at a primary:

(a) Unless he declares his party affiliation as required by this Act;  
(b) Who shall have signed the petition for nomination of a candidate of any party with which he does not affiliate, when such candidate is to be voted for at the primary;

(c) Who shall have signed the nominating papers of an independent candidate for any office for which candidates for nomination are to be voted for at such primary; or

(d) If he shall have voted after January 1, 1939 at a primary held under this Act of another political party within a period of twenty-three calendar months next preceding the calendar month in which such primary is held: *Provided*, participation by a primary elector in a primary of a political party which, under the provisions of section 2 of this Act, is a political party within a city, village or town only and entitled hereunder to make nominations of candidates for city, village or town offices only, and for no other office or offices, shall not disqualify such primary elector from participating in other primaries of his party: *And, provided*, that no qualified voter shall be precluded from participating in the primary of any purely city, village or town political party under the provisions of Section 2 of this Act, by reason of such voter having voted after January 1, 1939 at the primary of another political party within a period of twenty-three calendar months next preceding the calendar month in which the primary in which he seeks to participate is held.

(e) In all election precincts and districts not under the jurisdiction of a board of election commissioners in counties having a population of more than five hundred thousand (500,000) only persons whose names are entered on the registry books as prescribed by Section 2 of "An Act for the registry of Electors and to prevent fraudulent voting" (approved February, 1865 as amended), shall be entitled to vote at a primary in which candidates for State offices are to be nominated. But persons who have moved from one precinct to another or have become

of age or who have become naturalized, or who failed to register at the preceding general registration, or who have become eligible to vote after the register referred to herein has been completed may vote at a primary upon furnishing the district judges of election with an affidavit in writing showing his qualifications as a voter and prove by the oath of a householder and registered voter of his district that knows such person to be an inhabitant of the district. Proper forms for such affidavits to be furnished by the County Clerk.

In cities, villages and incorporated towns having a board of election commissioners only voters registered as provided by "An Act regulating the holding of elections and declaring the result thereof in cities, villages and incorporated towns in this State", approved June 19, 1885, as amended, shall be entitled to vote at such primary. [As Amended by Act approved January 30, 1939.]

**44. Voter—Party Affiliation, etc.]** [§ 408, Ch. 46, R. S.] Any person desiring to vote at a primary shall state his name, residence and party affiliation to the primary judges, one of whom shall thereupon announce the same in a distinct tone of voice, sufficiently loud to be heard by all persons in the polling place. If the person desiring to vote is not challenged, one of the primary judges shall give to him one, and only one, primary ballot of the political party with which he declares himself affiliated, on the back of which such primary judge shall endorse his initials in such manner that they may be seen when the primary ballot is properly folded. If the person desiring to vote is challenged he shall not receive a primary ballot from the primary judges until he shall have established his right to vote as hereinafter provided. No person who refuses to state his party affiliation shall be allowed to vote at a primary.

. . . . .

## 28. FEDERAL REGULATION OF POLITICAL PARTIES

The necessity of regulating in some manner the conduct and financing of political campaigns has long been recognized, and most of the states have passed legislation dealing with these matters in more or less detail. Although Congress does not have power to regulate the practices of political parties as such, it is empowered by the Constitution to regulate the manner of electing members of Congress. Acting under this and other authority, Congress in 1907 prohibited campaign contributions from corporations, in 1910 limited the amounts that might be spent in election campaigns of Representatives and required publicity of all receipts and expenditures, and in 1911 extended these provisions to Senators and to campaigns for nomination. The Supreme Court, in the *Newberry* case of 1921, declared this congressional regulation of party nominations to be unconstitutional, hence Congress in 1925 passed the so-called Federal Corrupt Practices Act, containing in revised form the substance of all these previous acts clearly within its

power. In 1939 Congress imposed further restrictions on political party practices by enacting the Hatch Act which forbade most federal officials and employees from engaging in political activity. Finally, through the device of investigating committees, used by the Senate in every presidential campaign and in several off-year campaigns since 1912, and occasionally also by the House, Congress has exercised a continuous restraint upon the campaign practices of the political parties.

### a. Newberry Case

[*Newberry v. United States* (1921), 256 U. S. 232, 257-258, 261-268; 65 L. Ed. 913, 921-925.]

Mr. Justice McReynolds delivered the opinion of the court: . . .

If it be practically true that, under present conditions, a designated party candidate is necessary for an election,—a preliminary thereto,—nevertheless his selection is in no real sense part of the manner of holding the election. This does not depend upon the scheme by which candidates are put forward. Whether the candidate be offered through primary, or convention, or petition, or request of a few, or as the result of his own unsupported ambition, does not directly affect the manner of holding the election. Birth must precede, but it is no part of either funeral or apotheosis.

Many things are prerequisites to elections or may affect their outcome,—voters, education, means of transportation, health, public discussion, immigration, private animosities, even the face and figure of the candidate; but authority to regulate the manner of holding them gives no right to control any of these. It is settled, e.g., that the power to regulate interstate and foreign commerce does not reach whatever is essential thereto. Without agriculture, manufacturing, mining, etc. commerce could not exist; but this fact does not suffice to subject them to the control of Congress. *Kidd v. Pearson*, 128 U. S. 1, 32 L. ed. 346, 2 Inters. Com. Rep. 232, 9 Sup. Ct. Rep. 6.

Election of Senators by state legislatures presupposed selection of their members by the people; but it would hardly be argued that therefore Congress could regulate such selection. In the Constitutional Convention of 1787, when replying to the suggestion that state legislatures should have uncontrolled power over elections of members of Congress, Mr. Madison said: "It seems as improper in principle, though it might be less inconvenient in practice, to give to the state legislatures this great authority over the election of the representatives of the people in the general legislature, as it would be to give to the latter a like power over the election of their representatives in the state legislatures." Supplement to Elliot's Debates, vol. 5, p. 402.

We cannot conclude that authority to control party primaries or conventions for designating candidates was bestowed on Congress by the grant of power to regulate the manner of holding elections. The fair intendment of the words does not extend so far; the framers of the Constitution did not ascribe to them any such meaning. Nor is this control necessary in order to effectuate the power expressly granted. On the other hand, its exercise would interfere with purely domestic affairs of the state, and infringe upon liberties reserved to the people.

It should not be forgotten that, exercising inherent police power, the state may suppress whatever evils may be incident to primary or convention. As "each House shall be the judge of the elections, qualifications and returns of its own members," and as Congress may by law regulate the times, places, and manner of holding elections, the national government is not without power to protect itself against corruption, fraud, or other malign influences.

The judgment of the court below must be reversed and the cause remanded for further proceedings in conformity with this opinion.

[Justices Holmes, Day, Van Devanter, and McKenna concurred in this opinion, Justice McKenna reserving the question of the power of Congress under the 17th Amendment.]

Mr. Chief Justice White, dissenting from the opinion, but concurring, with a modification, in the judgment of reversal: . . .

The provisions of §§ 2 and 3 of article 1 of the Constitution, fixing the composition of the House of Representatives and of the Senate, and providing for the election of Representatives by vote of the people of the several states, and of Senators by the state legislatures, were undoubtedly reservoirs of vital Federal power, constituting the generative sources of the provisions of § 4, clause 1, of the same article, creating the means for vivifying the bodies previously ordained. . . .

As without this grant no state power on the subject was possessed, it follows that the state power to create primaries as to United States Senators depended upon the grant for its existence. It also follows that, as the conferring of the power on the states and the reservation of the authority in Congress to regulate being absolutely coterminous, except as to the place of choosing Senators, which is not here relevant, it results that nothing is possible of being done under the former which is not subjected to the limitations imposed by the latter. And this is illustrated by the legislation of Congress and the decisions of this court, upholding the same. . . .

But it is said that, as the power which is challenged here is the right



of a state to provide for and regulate a state primary for nominating United States Senators free from the control of Congress, and not the election of such Senators, therefore, as the nominating primary is one thing and the election another and different thing, the power of the state as to the primary is not governed by the right of Congress to regulate the times and manner of electing Senators. But the proposition is a suicidal one, since it at one and the same time retains in the state the only power it could possibly have, as delegated by the clause in question, and refuses to give effect to the regulating control which the clause confers on Congress as to that very power. And mark, this is emphasized by the consideration that there is no denial here that the states possess the power over the Federal subject resulting from the provision of the Constitution, but a holding that Congress may not exert, as to such power to regulate, authority which the terms of the identical clause of the Constitution confer upon it.

But, putting these contradictions aside, let me test the contention from other and distinct points of view: (1) In last analysis the contention must rest upon the proposition that there is such absolute want of relation between the power of government to regulate the right of the citizen to seek a nomination for a public office and its authority to regulate the election after nomination, that a paramount government authority having the right to regulate the latter is without any power as to the former. The influence of who is nominated for elective office upon the result of the election to fill that office is so known of all men that the proposition may be left to destroy itself by its own statement. . . .

The large number of states which at this day have by law established senatorial primaries shows the development of the movement which originated so long ago under the circumstances just stated. They serve to indicate the tenacity of the conviction that the relation of the primary to the election is so intimate that the influence of the former is largely determinative of the latter. I have appended in the margin a statement from a publication on the subject, showing how well-founded this conviction is and how it has come to pass that in some cases, at least, the result of the primary has been in substance to render the subsequent election merely perfunctory. Under these conditions I find it impossible to say that the admitted power of Congress to control and regulate the election of Senators does not embrace, as appropriate to that power, the authority to regulate the primary held under state authority. . . .

[Justices Pitney, Brandeis, and Clarke concurred in this dissent, although filing a separate dissenting opinion.]

**b. Federal Corrupt Practices Act**

[U. S. Code of Laws in force Dec. 6, 1926, ch. 8. *U. S. Statutes at Large*, vol. 44, pt. 1, pp. 15-17.]

**Section 241. Definitions.**—When used in this chapter—(a) The term “election” includes a general or special election, and, in the case of a Resident Commissioner from the Philippine Islands, an election by the Philippine Legislature, but does not include a primary election or convention of a political party;

(b) The term “candidate” means an individual whose name is presented at an election for election as Senator or Representative in, or Delegate or Resident Commissioner to, the Congress of the United States, whether or not such individual is elected;

(c) The term “political committee” includes any committee, association, or organization which accepts contributions or makes expenditures for the purpose of influencing or attempting to influence the election of candidates or presidential and vice presidential electors (1) in two or more States, or (2) whether or not in more than one State if such committee, association, or organization (other than a duly organized State or local committee of a political party) is a branch or subsidiary of a national committee, association, or organization;

(d) The term “contribution” includes a gift, subscription, loan, advance, or deposit, of money, or anything of value, and includes a contract, promise, or agreement, whether or not legally enforceable to make a contribution;

(e) The term “expenditure” includes a payment, distribution, loan, advance, deposit, or gift, of money, or any thing of value, and includes a contract, promise, or agreement, whether or not legally enforceable, to make an expenditure;

(f) The term “person” includes an individual, partnership, committee, association, corporation, and any other organization or group of persons;

(g) The term “Clerk” means the Clerk of the House of Representatives of the United States;

(h) The term “Secretary” means the Secretary of the Senate of the United States;

(i) The term “State” includes Territory and possession of the United States. . . .

**242. Chairman and treasurer of political committee; duties as to contributions; accounts and receipts.**—(a) Every political committee shall have a chairman and a treasurer. No contribution shall be ac-

cepted, and no expenditure made, by or on behalf of a political committee for the purpose of influencing an election until such chairman and treasurer have been chosen.

(b) It shall be the duty of the treasurer of a political committee to keep a detailed and exact account of—

(1) All contributions made to or for such committee;

(2) The name and address of every person making any such contributions, and the date thereof;

(3) All expenditures made by or on behalf of such committee; and

(4) The name and address of every person to whom any such expenditure is made, and the date thereof.

(c) It shall be the duty of the treasurer to obtain and keep a receipted bill, stating the particulars, for every expenditure by or on behalf of a political committee exceeding \$10 in amount. The treasurer shall preserve all receipted bills and accounts required to be kept by this section for a period of at least two years from the date of the filing of the statement containing such items. . . .

**243. Accounts of contributions received.**—Every person who receives a contribution for a political committee shall, on demand of the treasurer, and in any event within five days after the receipt of such contribution, render to the treasurer a detailed account thereof, including the name and address of the person making such contribution, and the date on which received. . . .

**244. Statements by treasurer filed with Clerk of House of Representatives.**—(a) The treasurer of a political committee shall file with the Clerk between the 1st and 10th days of March, June, and September, in each year, and also between the 10th and 15th days, and on the 5th day, next preceding the date on which a general election is to be held, at which candidates are to be elected in two or more States, and also on the 1st day of January, a statement containing, complete as of the day next preceding the date of filing—

(1) The name and address of each person who has made a contribution to or for such committee in one or more items of the aggregate amount or value, within the calendar year, of \$100 or more, together with the amount and date of such contribution;

(2) The total sum of the contributions made to or for such committee during the calendar year and not stated under paragraph (1);

(3) The total sum of all contributions made to or for such committee during the calendar year;

(4) The name and address of each person to whom an expenditure in one or more items of the aggregate amount or value, within the calendar

year, of \$10 or more has been made by or on behalf of such committee, and the amount, date, and purpose of such expenditure;

(5) The total sum of all expenditures made by or on behalf of such committee during the calendar year and not stated under paragraph (4);

(6) The total sum of expenditures made by or on behalf of such committee during the calendar year.

(b) The statements required to be filed by subdivision (a) shall be cumulative during the calendar year to which they relate, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

(c) The statement filed on the 1st day of January shall cover the preceding calendar year. . . .

**245. Statements by others than political committee filed with Clerk of House of Representatives.**—Every person (other than a political committee) who makes an expenditure in one or more items, other than by contribution to a political committee, aggregating \$50 or more within a calendar year for the purpose of influencing in two or more States the election of candidates, shall file with the Clerk an itemized detailed statement of such expenditure in the same manner as required of the treasurer of a political committee by section 244 of this title. . . .

**246. Statements by candidates for Senator, Representative, Delegate, or Resident Commissioner filed with Secretary of Senate and Clerk of House of Representatives.**—(a) Every candidate for Senator shall file with the Secretary and every candidate for Representative, Delegate, or Resident Commissioner shall file with the Clerk not less than ten nor more than fifteen days before, and also within thirty days after, the date on which an election is to be held, a statement containing, complete as of the day next preceding the date of filing—

(1) A correct and itemized account of each contribution received by him or by any person from him with his knowledge or consent, from any source, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person who has made such contribution;

(2) A correct and itemized account of each expenditure made by him or by any person for him with his knowledge or consent, in aid or support of his candidacy for election, or for the purpose of influencing the result of the election, together with the name of the person to whom such expenditure was made; except that only the total sum of expenditures for items specified in subdivision (c) of section 248 of this title need be stated;

(3) A statement of every promise or pledge made by him or by any

person for him with his consent, prior to the closing of the polls on the day of the election, relative to the appointment or recommendation for appointment of any person to any public or private position or employment for the purpose of procuring support in his candidacy, and the name, address, and occupation of every person to whom any such promise or pledge has been made, together with the description of any such position. If no such promise or pledge has been made, that fact shall be specifically stated.

(b) The statements required to be filed by subdivision (a) shall be cumulative, but where there has been no change in an item reported in a previous statement only the amount need be carried forward.

(c) Every candidate shall inclose with his first statement a report, based upon the records of the proper State official, stating the total number of votes cast for all candidates for the office which the candidate seeks, at the general election next preceding the election at which he is a candidate. . . .

**247. Statements; verification; filing; preservation; inspection.—**

A statement required by this chapter to be filed by a candidate or treasurer of a political committee or other person with the Clerk or Secretary, as the case may be—

(a) Shall be verified by the oath or affirmation of the person filing such statement, taken before any officer authorized to administer oaths;

(b) Shall be deemed properly filed when deposited in an established post office within the prescribed time, duly stamped, registered, and directed to the Clerk or Secretary at Washington, District of Columbia, but in the event it is not received, a duplicate of such statement shall be promptly filed upon notice by the Clerk or Secretary of its nonreceipt;

(c) Shall be preserved by the Clerk or Secretary for a period of two years from the date of filing, shall constitute a part of the public records of his office, and shall be open to public inspection. . . .

**248. Limitation upon amount of expenditures by candidate.—**

(a) A candidate, in his campaign for election, shall not make expenditures in excess of the amount which he may lawfully make under the laws of the State in which he is a candidate, nor in excess of the amount which he may lawfully make under the provisions of this title.

(b) Unless the laws of his State prescribe a less amount as the maximum limit of campaign expenditures, a candidate may make expenditures up to—

(1) The sum of \$10,000 if a candidate for Senator, or the sum of \$2,500 if a candidate for Representative, Delegate, or Resident Commissioner; or

(2) An amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general election for all candidates for the office which the candidate seeks, but in no event exceeding \$25,000 if a candidate for Senator or \$5,000 if a candidate for Representative, Delegate, or Resident Commissioner.

(c) Money expended by a candidate to meet and discharge any assessment, fee, or charge made or levied upon candidates by the laws of the State in which he resides, or expended for his necessary personal, traveling, or subsistence expenses, or for stationery, postage, writing, or printing (other than for use on billboards or in newspapers), for distributing letters, circulars, or posters, or for telegraph or telephone service, shall not be included in determining whether his expenditures have exceeded the sum fixed by paragraph (1) or (2) of subdivision (b) as the limit of campaign expenses of a candidate. . . .

**249. Promises or pledges by candidate.**—It is unlawful for any candidate to directly or indirectly promise or pledge the appointment, or the use of his influence or support for the appointment of any person to any public or private position or employment, for the purpose of procuring support in his candidacy. . . .

**250. Expenditures to influence voting.**—It is unlawful for any person to make or offer to make an expenditure, or to cause an expenditure to be made or offered, to any person, either to vote or withhold his vote, or to vote for or against any candidate, and it is unlawful for any person to solicit, accept, or receive any such expenditure in consideration of his vote or the withholding of his vote. . . .

**251. Contributions by national banks or other Federal corporations; penalty.**—It is unlawful for any national bank, or any corporation organized by authority of any law of Congress, to make a contribution in connection with any election to any political office, or for any corporation whatever to make a contribution in connection with any election at which presidential and vice presidential electors or a Senator or Representative in, or a Delegate or Resident Commissioner to, Congress are to be voted for, or for any candidate, political committee, or other person to accept or receive any contribution prohibited by this section. Every corporation which makes any contribution in violation of this section shall be fined not more than \$5,000; and every officer or director of any corporation who consents to any contribution by the corporation in violation of this section shall be fined not more than \$1,000, or imprisoned not more than one year, or both. . . .

**252. General penalties for violations.**—(a) Any person who violates any of the foregoing provisions of this chapter, except those for which a



specific penalty is imposed by section 208 of Title 18, and section 251 of this title, shall be fined not more than \$1,000 or imprisoned not more than one year, or both.

(b) Any person who willfully violates any of the foregoing provisions of this chapter, except those for which a specific penalty is imposed by section 208 of Title 18, and section 251 of this title, shall be fined not more than \$10,000 and imprisoned not more than two years. . . .

**253. Expenses of election contests.**—This chapter shall not limit or affect the right of any person to make expenditures for proper legal expenses in contesting the results of an election. . . .

**254. State laws not affected.**—This chapter shall not be construed to annul the laws of any State relating to the nomination or election of candidates, unless directly inconsistent with the provisions of this title, or to exempt any candidate from complying with such State laws. . . .

**255. Partial invalidity.**—If any provision of this chapter or the application thereof to any person or circumstance is held invalid, the validity of the remainder of the chapter and of the application of such provision to other persons and circumstances shall not be affected thereby. . . .

**256. Citation.**—This chapter may be cited as the "Federal Corrupt Practices Act." . . .

### c. Hatch Act

[Act of Aug. 2, 1939. Text in *N. Y. Times*, July 23, 1939, Sec. 1, p. 2.]

## AN ACT

### TO PREVENT PERNICIOUS POLITICAL ACTIVITIES

Be it enacted by the Senate and the House of Representatives of the United States of America, in Congress assembled, that it shall be unlawful for any person to intimidate, threaten, or coerce, or to attempt to intimidate, threaten or coerce, any other person for the purpose of interfering with the right of such other person to vote or to vote as he may choose, or of causing such other person to vote for, or not to vote for, any candidate for the office of President, Vice President, Presidential elector, member of the Senate or member of the House of Representatives at any election held solely or in part for the purpose of selecting a President, a Vice President, or a Presidential elector, or any member of the Senate or any member of the House of Representatives, delegates or commissioners from the territories and insular possessions.

**Sec. 2.** It shall be unlawful for any person employed in any Administrative position by the United States, or by any department, independent agency, or any other agency of the United States (including any corpora-

tion controlled by the United States or any agency thereof, and any corporation all of the capital stock of which is owned by the United States or any agency thereof), to use his official authority for the purpose of interfering with, or affecting the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, member of the Senate, or member of the House of Representatives, delegates or commissioners from the territories and insular possessions.

Sec. 3. It shall be unlawful for any person, directly or indirectly, to promise any employment, position, work, compensation, or other benefit, provided for or made possible in whole or in part by any act of Congress, to any person as consideration, favor, or reward for any political activity or for the support of or opposition to any candidate or any political party in any election.

Sec. 4. Except as may be required by the provisions of subsection (b) Section 9 of this act, it shall be unlawful for any person to deprive, attempt to deprive, or threaten to deprive, by any means, any person of any employment, position, work, compensation, or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes, on account of race or creed, color or any political activity, support of, or opposition to any candidate or any political party in any election.

Sec. 5. It shall be unlawful for any person to solicit or receive or be in any manner concerned in soliciting or receiving any assessment, subscription or contribution for any political purpose whatever from any person known by him to be entitled to or receiving compensation, employment or other benefit provided for or made possible by any act of Congress appropriating funds for work relief or relief purposes.

Sec. 6. It shall be unlawful for any person for political purposes to furnish or to disclose, or to aid or assist in furnishing or disclosing, any list or names of persons receiving compensation, employment or benefits provided for or made possible by any act of Congress appropriating, or authorizing the appropriation of, funds for work relief or relief purposes, to a political candidate, committee, campaign manager, or to any person for delivery to a political candidate, committee or campaign manager, and it shall be unlawful for any person to receive any such list or names for political purposes.

Sec. 7. No part of any appropriation made by any act, heretofore or hereafter enacted, making appropriations for work relief, relief, or otherwise, to increase employment by providing loans and grants for public-works projects, shall be used for the purpose of, and no authority conferred by any such act upon any person shall be exercised or administered

for the purpose of interfering with, restraining, or coercing any individual in the exercise of his right to vote at any election.

Sec. 8. Any person who violates any of the foregoing provisions of this act upon conviction thereof shall be fined not more than \$1,000 or imprisoned for not more than one year, or both.

Sec. 9. (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employe in the executive branch of the Federal Government, or any agency or department thereof, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects.

For the purposes of this section the term "officer" or "employe" shall not be construed to include (1) the President and Vice President of the United States, (2) persons whose compensation is paid from the appropriation for the office of the President, (3) heads and assistant heads of executive departments, (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the nation-wide administration of Federal laws.

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Sec. 9A. (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government whose compensation, or any part thereof, is paid from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person.

Sec. 10. All provisions of this act shall be in addition to, not in substitution for, existing law.

Sec. 11. If any provision of this act, or the application of such provision to any person or circumstance, is held invalid, the remainder of the act, and the application of such provision to other persons or circumstances, shall not be affected thereby.

## 29. REGULATION OF NATIONAL PARTY ORGANIZATION

Congress has not yet attempted any regulation of the national party organizations, and it is doubtful whether any such legislation would be upheld by the courts. Each party is therefore apparently free to determine the character of its own national organization for itself. With the institution of the direct primary, however, several states have provided by law for the method by which the member or members of the National Committee from those states shall be selected. Although there is some question whether such state legislation is actually binding upon the national party organizations, the parties have in recent years generally accepted these regulations as though they were binding. An element of state or popular control of the national party organization has thus been introduced into our political system.

### a. Composition and Powers of Republican National Committee

[*Official Proceedings, Republican National Convention, 1936, pp. 102-104.*]

#### RULE No. 22

A National Committee shall be elected by each National Convention, called to nominate Candidates for President and Vice-President, and shall consist of two members from each State, Territory, Territorial Possession and the District of Columbia.

#### RULE No. 23

The Roll shall be called and the Delegation from each State, Territory, Territorial Possession and the District of Columbia shall nominate, through its Chairman, one man and one woman to act as Members of the National Committee.

#### RULE No. 24

When the Law of any State provides a method for the selection of members of the National Committees of political parties, the nomination of the members of the Republican National Committee in accordance with the provisions of such law, shall be considered nominations to be carried into effect by the Delegation from such State.

#### RULE No. 25

Where the laws of a State do not provide a method for the selection of members of the National Committee of political parties, instructions by State and District Conventions to Delegates to the National Convention as to nominations for membership in the National Committee, shall be obeyed by such Delegates; and if not obeyed, may be made operative by

a vote of the National Convention or referred to the National Committee with full power to act.

RULE No. 26

When a majority of the Delegates from each State, Territory, Territorial Possession and the District of Columbia shall have so nominated a member of the National Committee, the Convention shall thereupon elect the person so nominated to serve as a member of the Committee until the meeting of the National Committee elected by the next National Convention.

RULE No. 27

The National Committee shall issue the Call for the next National Convention, to nominate Candidates for President and Vice-President of the United States at least four months before the time fixed for said Convention; and Delegates and Alternates to such Convention shall be chosen in such manner, and the Call shall be issued and promulgated in such manner as the National Committee shall provide, but not, however, in a manner inconsistent with these Rules.

RULE No. 28

The Officers of the National Committee shall consist of a Chairman, four Vice-Chairmen, a Secretary, a Treasurer and General Counsel, and such other officers as the Committee shall deem necessary.

RULE No. 29

The National Committee is authorized and empowered to select an Executive Committee, to consist of fifteen members, in addition to which the Chairman, Vice-Chairman, Secretary, Treasurer and General Counsel shall be ex-officio members and the Chairman, with the consent of the National Committee, may appoint such other Committees and assistants as he may deem necessary.

RULE No. 30

Vacancies in the National Committee shall be filled by the Committee upon the nomination of the Republican State Committee in and for the State, Territory, Territorial Possession or District of Columbia in which the vacancy occurs; the National Committee shall, however, have power to declare vacant the seat of any member who refuses to support the nominees of the Convention, which elected such National Committee and to fill such vacancy.

RULE No. 31

The first meeting of the National Committee shall take place within ten days after the adjournment of the National Convention electing such Committee, upon the Call of the member oldest in time of service upon the previous National Committee; and thereafter upon call of the Chairman, or, in case of vacancy in the Chairmanship, upon call of the ranking Vice-Chairman, but such call shall be issued at least ten days in advance of the date of the proposed meeting. Upon written petition of 16 or more members of the National Committee, representing not less than 16 States, filed jointly or separately with the Chairman, asking for a meeting of the National Committee, it shall be the duty of the Chairman, within ten days from receipt of said petition to issue a call for a meeting of the National Committee, to be held in the City of Washington, D. C., the date of such called meeting to be not later than 20 days or earlier than ten days from the date of the Call.

RULE No. 32

The rules of the House of Representatives of the United States shall govern in all meetings of the National Committee in so far as they are applicable and not inconsistent with these Rules. The Committee shall make its own rules governing the use of proxies at any meeting.

**b. Composition and Powers of Democratic National Committee**

[*Official Proceedings, Democratic National Convention, 1936, p. 300.*]

*Resolved*, That the National Committee shall consist of one man and one woman from each State, district and territory, the members of said committee to be selected in the manner prescribed by the laws of the respective States and territories; and where there shall be no statutory provision, that method of selection shall be pursued which conforms to the established party customs and precedents, or to the regularly adopted party rules and regulations. All such selections, except where contests exist, shall be acted upon by the Democratic National Convention, and the members of the committee whose selection is ratified and confirmed shall hold office until the adjournment of the next succeeding National Convention, or until their successors shall be chosen. Where a vacancy occurs, the vacancy shall be filled by the State, territory, or district committee. No person not a resident of the State, territory, or colonial possession from which he or she is elected or appointed shall be eligible to hold such office; and be it further



*Resolved*, That said National Committee is hereby authorized to elect a Chairman, Secretary and Treasurer, and to elect and select such officers and appoint such committees as in the judgment of said committee are necessary for the conduct of the business and affairs of said committee, and the said committee is hereby authorized to empower the Chairman of said committee to appoint such other subordinate committees as he may from time to time deem necessary.

### c. Selection of National Committeemen in Nebraska

[*Compiled Statutes of Nebraska, 1929, p. 867 (Ch. 32, Art. 11).*]

**32-1118. . . . Election of Delegates to National Convention; National Committeemen.** In the years that a president and vice-president are to be elected there shall be elected, at the primary election, delegates and alternates to the national conventions and members of the national committees of the several parties. . . .

**32-1119. . . .** Nominating petitions for delegates and alternates at large to the national conventions and for members of the national committees shall contain the names of not less than five hundred electors of each congressional district of the party which such delegates and committeemen are to represent; . . . Such petitions shall be signed by electors residing in at least two-thirds of the counties of said district. . . .

**32-1120. . . .** In no case shall more than five per cent of the total vote of any political party in the state, or in any congressional district, be required to sign the petitions referred to in this article. . . .

**32-1121. . . .** The secretary of state shall grant certificates of election to persons elected as members of the national committee and as delegates and alternates to national conventions of the several parties subject to the provisions of this article, which certificates shall show the number of votes received in the state by each candidate for president and vice-president of the political party represented by such delegate. . . .

### d. Selection of National Committeemen in West Virginia

[*West Virginia Code of 1937, p. 24.*]

**§ 62. [5] Members of National Party Committee.**—The members of the national party executive committee of any political party, to which the State is entitled under the national organization and the rules and regulations of the national committee of the party, shall be elected by the state executive committee of such party, unless the rules of the na-

tional party otherwise provide, in which latter event they shall be selected in all respects as provided for the selection thereof by the rules and regulations of the national organization of the political party and the resolutions of the delegated representatives of the political party passed and adopted by any national convention of such political party. A vacancy in the membership of a national party executive committee shall be filled by the state committee of the party unless the rules of the national party otherwise provide. [1915, c. 26; 1916, 3rd Ex. Sess., c. 5, § 27; Code 1923, c. 3, § 26a (27).]

### 30. PARTY SLATE-MAKING

Primary laws, which have now been enacted in some form in almost every state, have as their principal purpose the popular control of nominations. These laws presume that properly qualified persons will freely offer themselves as candidates within their respective parties and that the voters within each party will exercise their free choice at the primary among these various candidates. The development of well-defined factions within the parties has, however, led to the practice of "slate-making"; that is, of certain self-appointed leaders agreeing beforehand upon particular candidates, eliminating all others in some manner, and thus limiting the choice of the voter at the polls. The apparent impossibility of avoiding such pre-primary slates has led to the suggestion, notably by Charles E. Hughes when governor of New York, that such slate-making should be definitely provided for by law, in order that it be done in an official and responsible manner. The suggestion has been put into effect in several states, the first and perhaps the most unique being the method provided by the so-called Richards Primary of South Dakota, which was adopted in 1912 but repealed in 1929.

#### a. Slate-Making in Illinois

[Account in *Chicago Tribune*, Sept. 11, Sept. 23, Oct. 3, 1923.]

Gubernatorial candidates who aspire to lead the fight against Gov. Len Small in the Republican primary next April held a little conference in Chicago yesterday [Sept. 10, 1923]. Party chieftains, in their capacity as factional leaders, were left on the outside. Attorney General Edward J. Brundage was the only group leader to attend and he sat in as a potential candidate.

Others in the conference were John H. Harrison of Danville, State Senator Thurlow G. Essington, Streator; State Senator Otis F. Glenn, Murphysboro; Ex-Lieut. Gov. John G. Oglesby of Elkhart, and S. S. Tanner of Minier.

Secretary of State Louis L. Emmerson and Frank L. Smith were the only possible entries mentioned who did not attend.

The conference had two important results. First, the conferees

agreed they should attempt to settle the candidacy matter among themselves. Second, they made an ironclad agreement to stand by the candidate of their own choice in offering him to the party leaders. Inasmuch as all leading contenders except Emmerson and Smith were present, they took the position that they could not be charged with preëmpting the anti-Small nomination.

Plans for consolidating all the Republican forces opposed to the Small administration were discussed at length yesterday [Sept. 22, 1923] at a conference of representatives of six potential gubernatorial candidates at the Hotel Sherman.

In addition to the candidates' representatives, State Chairman Walter A. Rosenfield and former Senator Lawrence Y. Sherman were present by special invitation, and Chairman Rosenfield, authorized to act as spokesman to the press, made the following statement:

"The meeting today was occupied with an informal discussion of the situation as a whole, without any definite attempt to agree on a candidate. What occurred showed the complete accord of those present and the candidates they represent. But it was agreed that it was desirable for those in attendance to consult their principals further and meet again in Chicago a week from next Monday."

The candidates represented and those who spoke for them were the following:

**Attorney General E. J. Brundage**—County Chairman Homer K. Galpin, Chicago, and State's Attorney Fred C. Mortimer, Sangamon county.

**Senator Otis F. Glenn**—Senator James E. MacMurray, Chicago, and County Chairman Charles E. Feirich, Jackson county.

**John G. Oglesby**—C. J. Doyle, former secretary of state, and Speaker David E. Shanahan.

**S. S. Tanner**—Godfrey Luthy, Peoria, and C. E. Aleshire, Chicago.

**Senator Thurlow G. Essington**—William Boyes and A. H. Jones, Streator.

**John H. Harrison**—L. T. Allen, state committeeman, Eighteenth district, and W. J. Parrot, Danville.

United States Senator McKinley is expected home before the next conference, and it is understood he will be consulted before a decision is made by these twelve concerning which of the six candidates shall be agreed upon to oppose Small.

State Senator Thurlow G. Essington of LaSalle county will lead the

Republican allied forces in the gubernatorial primary against Gov. Len Small next April.

Senator Essington was selected as the anti-Small candidate for governor last night [Oct. 2, 1923] following an all day caucus at the Congress hotel by representatives of the six candidates who entered the "self-elimination" agreement—Essington, Attorney Gen. Edward J. Brundage, State Senator Otis F. Glenn, John H. Harrison, S. S. Tanner and former Lieut. Gov. John G. Oglesby.

A "ratification" convention of representative Republicans from all parts of the state is contemplated in the near future for the purpose of obtaining endorsement of the action of yesterday's caucus. This convention probably will be held at Peoria.

The "nomination" of the LaSalle county senator came on the twenty-fourth ballot. Besides the twelve representatives who did the balloting those present included United States Senators McCormick and McKinley; ex-Senator Lawrence Y. Sherman, national committeeman; Walter Rosenfield, Republican state chairman; Mrs. Joseph T. Bowen, Illinois woman member of the national committee, and Mrs. George R. Dean, chairman of the Republican women's organization.

Senator McKinley came to Chicago, from his home in Champaign. Neither he nor Senator McCormick expressed a preference among the six candidates during the entire caucus. The question was left entirely to the twelve delegates, who frequently left the conference to talk with their principals.

Mr. Tanner and Attorney General Brundage left the city hours before the choice was made. The former had a speaking engagement at Shelbyville, and the attorney general had business before the Illinois Supreme Court, which opened its October term yesterday.

The Tanner delegates, it is understood, were the first to swing to Essington after the early ballots. Senator Glenn was next to instruct his delegates for Essington. The two senators are close colleagues and were dominant figures in the "vigilante" group that fought the treasury raids and other tactics played by the state administration in the last legislature.

It had been agreed that the winning candidate should receive at least eight votes. The final swing that put Essington over came when Harrison and Oglesby instructed their men for the LaSalle county senator. It was immediately made unanimous. . . .

A formal statement announcing the result of the conference was issued by National Committeeman Sherman, who presided. It says:

"Five of the Republican candidates for the nomination for governor have agreed in the interest of harmony and good government to eliminate

themselves in favor of State Senator Thurlow G. Essington of Streator and recommend him to submit himself to the Republican voters of this state at the April, 1924, primary election as a candidate able by his nomination and election to assure to the people an efficient, honest and economical administration of the state's affairs and at the same time unite the party to that end.

"The United States senators urged upon the conferees representing the six candidates the duty in this regard, but refrained from influencing or attempting to influence directly or indirectly the action of the several candidates or the members of this conference.

"Mrs. Bowen, national committee-woman from Illinois, and Mrs. Dean, who came on the invitation of Mrs. Bowen, representing the women's Republican organizations of Illinois; Walter A. Rosenfield, chairman of the Republican state committee, and Homer K. Galpin, chairman of the Cook county Republican central committee, all sat in the conference by its unanimous request."

#### **b. Proposal Conventions in South Dakota**

[Clarence A. Berdahl, "The Operation of the Richards Primary." Reprinted from *The Annals of the American Academy of Political and Social Science*, Philadelphia, Pa., March, 1923, vol. CVI, no. 195, pp. 160-163.]

For the selection of candidates and issues, the Richards law provides a very elaborate and somewhat complicated machinery. In two of the steps involved in the complete process (the precinct initiatory elections held in November of every odd-numbered year, and the state-wide primary in March of every even-numbered year) the voter participates directly. But especially important are the representative conventions held by each party in both county and state, for the purpose of proposing candidates and issues, from which final selection is made at the following primary. The county proposal conventions for each party are made up of three proposalmen elected by the respective party voters in each precinct under a regulated caucus system, the so-called precinct initiatory election; while the state proposal conventions are similarly composed of three proposalmen from each county, but chosen for each party by the respective county conventions. Both county and state conventions are, like the party committees, based on the idea of "unit representation," in that each proposalsman has a vote equal to one-third the number of votes cast at the last general election in his precinct or county for his party's candidate for governor. The details as to time of meeting, organization, and procedure of all these proposal conventions are carefully regulated in the law.

*Majority and Minority Proposals.*—The plan of an initial proposal of candidates by pre-primary conventions is in accord with the growing desire to attach more official responsibility to the party organization, and has been adopted to some extent by other states, notably Minnesota. The Richards plan is decidedly novel, however, in that it expressly recognizes the existence of opposing factions within a party and provides for an official slate of candidates to be proposed by both the majority and minority factions.

The majority in a proposal convention first selects its candidates and principles. Thereupon the minority, if dissatisfied and if composed of at least five proposalmen, is permitted to "protest" by selecting and filing its own slate. Both the majority and minority (or protesting) slates are given a place on the primary ballot, but without any distinction as to name, both being called merely representative proposals. It is possible for the voter to distinguish these on the ballot, however, since the majority proposals must be placed in the last column of the ballot, and the minority proposals in the column next to the last. It may be noted also that only two official factions are recognized, the law providing that in case there is more than one group of protesting proposals, those first filed shall be placed on the ballot.

Thus, in the Republican State Proposal Convention of December, 1919, General Wood received 28,599 votes to 15,442 for Governor Lowden, and thereupon became the "majority" candidate for the presidential nomination. Governor Lowden was promptly named as the minority or "protesting" candidate, and as such contested with General Wood for the support of the South Dakota Republicans. Similarly, the Democrats selected President Wilson and former Ambassador Gerard as the majority and minority candidates of their party.

*Independent Proposals.*—In addition to the two "representative" slates that may be put forward by the officially recognized factions in the proposal conventions, the Richards law permits the proposal of an unlimited number of independent candidates for any office by the usual process of a petition with a required number of signatures. In fact, such independent candidates are definitely encouraged in that they are given the first column on the ballot, generally conceded to be the choice position, and are given prior consideration in other respects, in order, as is stated in the law, "to encourage leadership."

The Richards law goes so far in its attempt to encourage such independent leadership within a party, as to provide that any independent candidate for the nomination for President or governor who received as much as 10 per cent of the total party vote at the primary election, shall



## 31. PRIMARY ELECTION BALLOTS

### a. Primary Ballot in Illinois

# Specimen Ballot

for Primary Election to be held in

Champaign County, Illinois, on

TUESDAY, APRIL 14, 1936

## Republican Primary Ballot

FOR PRESIDENT OF THE UNITED STATES  
(Vote for One)

- ☐ FRANK KNOX
- ☐ WILLIAM E. BORAH

FOR UNITED STATES SENATOR  
(Vote for One)

- ☐ WILLIS A. OVERHOLSER
- ☐ ORVILLE J. TAYLOR
- ☐ WILLIAM J. BAKER
- ☐ OTIS F. GLENN
- ☐ WILLIAM E. HULL

FOR GOVERNOR  
(Vote for One)

- ☐ LEN SMALL
- ☐ C. WAYLAND BROOKS
- ☐ H. WALLACE CALDWELL
- ☐ OSCAR E. CARLSTROM
- ☐ GEORGE W. DOWELL
- ☐ THOMAS P. GUNNING
- ☐ J. PAUL KUHN
- ☐ JOHN G. OGLESBY

FOR LIEUTENANT GOVERNOR  
(Vote for One)

- ☐ A. LINCOLN WISLER
- ☐ JOHN V. CLINNIN
- ☐ HARRY F. HAMLIN
- ☐ GEORGE HATZENBUHLER
- ☐ JAMES A. McCALLUM
- ☐ THEODORE D. SMITH

FOR SECRETARY OF STATE  
(Vote for One)

- ☐ WILLIAM J. STRATTON
- ☐ JOHN W. KAPP, JR.

c. Open Primary

## Sample Ballot for Primary Election

# Consolidated Primary

(Fac-simile of signature)

### Farmer-Labor Party Ticket

You cannot split your ballot. If you vote for candidates of more than one party, your ballot will be rejected.

Put a cross mark (X) opposite the name of the candidate for whom you wish to vote.



#### UNITED STATES SENATOR IN CONGRESS

HENRIK SHIPSTEAD

FRANCIS H. SHOEMAKER

Vote For One

#### GOVERNOR

JOHN LIND

FLOYD B. OLSON

Vote For One

#### RAILROAD AND WAREHOUSE COMMISSIONER

CHARLES J. JOHNSON

ELMER GOTTFREID JOHNSON

ALEX KANTER

CHARLES MUNN

Vote For One

#### CLERK OF SUPREME COURT

RUSSELL O. GUNDERSON

LAURA E. NAPLIN

Vote For One

#### REPRESENTATIVE IN CONGRESS.....DISTRICT

Vote For One

### Republican

You cannot split your ballot. If you vote for candidates of more than one party, your ballot will be rejected.

Put a cross mark (X) opposite the name of the candidate for whom you wish to vote.

#### UNITED STATES SENATOR IN CONGRESS

TOM DAVIS

N. J. HOLMBERG

EDGAR B. BERNARD

A. B. GILBERT

MARTIN A. NELSON

KNUTE O. SANDUM

LIEUTENANT GOVERNOR

JOHN W. EVANS

FRANKLIN F. ELLSVOLD

#### CLERK OF SUPREME COURT

GRACE KAERCHER

GEORGE H. HIGGINS

WM. T. JOHNSON

REPRESENTATIVE IN CONGRESS.....DISTRICT

## CHAPTER VI

### SUFFRAGE AND ELECTIONS

#### 32. CONTROL OF SUFFRAGE

The determination of suffrage qualifications is, on the whole, clearly within the jurisdiction of the states, subject only to the limitations imposed by the 14th, 15th, and 19th Amendments. In spite of the first two of these Amendments, the several Southern states have sought means to disfranchise the negro. The so-called "grandfather clauses" having been declared unconstitutional by the Supreme Court, other means were devised, of which the most effective was the "white primary." This was thought to be within the Constitution, since the primary was considered a purely state institution not subject to national regulation. The South being a one-party region, it is obvious that if the negro could be prevented from participation in the primary, his participation in the later election would be of no importance. The "white primary" was, however, also declared unconstitutional in 1927, although in later decisions<sup>1</sup> the Supreme Court made it clear that this did not prevent the political party from determining its own membership and excluding negroes, if acting as a private organization on its own initiative and not as an agent of the state. There are also still in effect tax requirements and the so-called "reasonable understanding" clauses, the operation of which serves to bar the negro from the polls and also to emphasize the power of the state that remains in spite of the constitutional limitations.

##### a. Texas White Primary Case

[*Nixon v. Herndon* (1927), 273 U. S. 536; 71 L. Ed. 759.]

Mr. Justice Holmes delivered the opinion of the court:

This is an action against the judges of elections for refusing to permit the plaintiff to vote at a primary election in Texas. It lays the damages at \$5,000. The petition alleges that the plaintiff is a negro, a citizen of the United States and of Texas and a resident of El Paso, and in every way qualified to vote, as set forth in detail, except that the statute to be mentioned interferes with his right; that on July 26, 1924, a primary election was held at El Paso for the nomination of candidates for a senator and representatives in Congress and state and other officers, upon the Democratic ticket; that the plaintiff, being a member of the Democratic party, sought to vote, but was denied the right by defend-

<sup>1</sup> *Nixon v. Condon* (1932), 286 U. S. 73, 76 L. Ed. 984; *Grovey v. Townsend* (1935), 295 U. S. 45, 79 L. Ed. 1292.

ants; that the denial was based upon a statute of Texas enacted in May, 1923, and designated article 3093a, by the words of which "in no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas," etc., and that this statute is contrary to the 14th and 15th Amendments to the Constitution of the United States. The defendants moved to dismiss upon the ground that the subject matter of the suit was political and not within the jurisdiction of the court and that no violation of the Amendments was shown. The suit was dismissed and a writ of error was taken directly to this court. Here no argument was made on behalf of the defendants but a brief was allowed to be filed by the attorney general of the state. . . .

The important question is whether the statute can be sustained. But although we state it as a question the answer does not seem to us open to a doubt. We find it unnecessary to consider the 15th Amendment, because it seems to us hard to imagine a more direct and obvious infringement of the 14th. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them. . . . That Amendment "not only gave citizenship and the privileges of citizenship to persons of color, but it denied to any state the power to withhold from them the equal protection of the laws. . . . What is this but declaring that the law in the states shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the states, and, in regard to the colored race, for whose protection the Amendment was primarily designed, that no discrimination shall be made against them by law because of their color?" . . . The statute of Texas, in the teeth of the prohibitions referred to, assumes to forbid negroes to take part in a primary election the importance of which we have indicated, discriminating against them by the distinction of color alone. States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case.

Judgment reversed.

#### **b. Reasonable Understanding Provisions in Louisiana**

*[Louisiana Constitution of 1921, Art. VIII, Secs. 1-2.]*

SECTION 1. After January 1, 1922, the right to vote in Louisiana shall not exist except under the provisions of this constitution.

Every citizen of this state and the United States, native born or natu-

ralized, not less than 21 years of age, and possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election in the state by the people.

(a) He shall have been an actual bona fide resident of the state for two years, of the parish one year, of the municipality in municipal elections, four months, and of the precinct, in which he offers to vote, three months next preceding the election. . . .

(b) He shall be at the time he offers to vote, legally enrolled as a registered voter on his own personal application, in accordance with the provisions of this constitution, and the laws enacted thereunder.

(c) He shall be of good character and shall understand the duties and obligations of citizenship under a republican form of government. He shall be able to read and write, and shall demonstrate his ability to do so when he applies for registration by making, under oath, administered by the registration officer or his deputy, written application therefor, in the English language, or his mother tongue, which application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated, and signed by him, except that he may date, fill out, and sign the blank application for registration hereinafter provided for, and, in either case, in the presence of the registration officer or his deputy, without assistance or suggestion from any person or any memorandum whatever, other than the form of application hereinafter set forth; provided, however, that if the applicant be unable to write his application in the English language, he shall have the right, if he so demands, to write the same in his mother tongue from the dictation of an interpreter; and, if the applicant is unable to write his application by reason of physical disability, the same shall be written at his dictation by the registration officer or his deputy, upon his oath of such disability. . . .

Said applicant shall also be able to read any clause in this constitution, or the Constitution of the United States, and give a reasonable interpretation thereof.

(d) If he is not able to read and write, then he shall not be entitled to register if [unless] he shall be a person of good character and reputation, attached to the principles of the Constitution of the United States and of the state of Louisiana, and shall be able to understand and give a reasonable interpretation of any section of either constitution when read to him by the registrar, and he must be well disposed to the good order and happiness of the state of Louisiana and of the United States and must understand the duties and obligation of citizenship under a republican form of government. . . .

SECTION 2. No person less than sixty years of age shall be permitted to vote at any election in the state who shall not, in addition to the qualifications above prescribed, have paid on or before the 1st day of December, of each year, for the two years next preceding the year in which he offers to vote, a poll tax of one dollar per annum, to be used exclusively in aid of the public schools of the parish in which such tax shall have been collected; which tax is hereby imposed on every resident of this state between the age of twenty-one and sixty years. . . .

Every person liable for such tax shall, before being allowed to vote, exhibit to the commissioners of election his poll tax receipts for two years as above prescribed, issued on the official form, or duplicates thereof, in the event of loss; or proof of payment of such poll taxes may be made by certificate of the tax collector, which shall be sent to the commissioners of the several voting precincts, showing a list of those who have paid said two years' poll taxes as above provided, and the dates of payment. . . .

### 33. SUFFRAGE QUALIFICATIONS

The power of each state to determine suffrage qualifications for itself is obvious, provided only that the state conforms to the limitations prescribed in the United States Constitution. Hence it follows that these qualifications may vary from time to time and from state to state. During the early history of this country the qualifications were very severe, religious and especially property tests being commonly imposed. As a part of the so-called "democratic wave," these restrictions were generally abandoned and the franchise was widely extended. Of recent years, the tendency has been again to impose more restrictions, but now chiefly in the form of an educational or literary test.

#### a. Early Suffrage Provisions in Connecticut

[Connecticut Constitution of 1818, Art. VI; in Thorpe, *American Charters, Constitutions, and Organic Laws*, vol. I, p. 544.]

SECTION 1. All persons who have been, or shall hereafter, previous to the ratification of this Constitution, be admitted freemen, according to the existing laws of this State, shall be electors.

SEC. 2. Every white male citizen of the United States, who shall have gained a settlement in this State, attained the age of twenty-one years, and resided in the town in which he may offer himself to be admitted to the privilege of an elector, at least six months preceding; and have a freehold estate of the yearly value of seven dollars in this State; or, having been enrolled in the militia, shall have performed military duty therein for the term of one year next preceding the time he shall



ralized, not less than 21 years of age, and possessing the following qualifications, shall be an elector, and shall be entitled to vote at any election in the state by the people.

(a) He shall have been an actual bona fide resident of the state for two years, of the parish one year, of the municipality in municipal elections, four months, and of the precinct, in which he offers to vote, three months next preceding the election. . . .

(b) He shall be at the time he offers to vote, legally enrolled as a registered voter on his own personal application, in accordance with the provisions of this constitution, and the laws enacted thereunder.

(c) He shall be of good character and shall understand the duties and obligations of citizenship under a republican form of government. He shall be able to read and write, and shall demonstrate his ability to do so when he applies for registration by making, under oath, administered by the registration officer or his deputy, written application therefor, in the English language, or his mother tongue, which application shall contain the essential facts necessary to show that he is entitled to register and vote, and shall be entirely written, dated, and signed by him, except that he may date, fill out, and sign the blank application for registration hereinafter provided for, and, in either case, in the presence of the registration officer or his deputy, without assistance or suggestion from any person or any memorandum whatever, other than the form of application hereinafter set forth; provided, however, that if the applicant be unable to write his application in the English language, he shall have the right, if he so demands, to write the same in his mother tongue from the dictation of an interpreter; and, if the applicant is unable to write his application by reason of physical disability, the same shall be written at his dictation by the registration officer or his deputy, upon his oath of such disability. . . .

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offer himself for admission, or being liable thereto shall have been, by authority of law, excused therefrom; or shall have paid a State tax within the year next preceding the time he shall present himself, for such admission; and shall sustain a good moral character, shall, on his taking such oath as may be prescribed by law, be an elector.

SEC. 3. The privileges of an elector shall be forfeited by a conviction of bribery, forgery, perjury, duelling, fraudulent bankruptcy, theft, or other offense for which an infamous punishment is inflicted.

### b. Suffrage Provisions in Illinois

[*Illinois Election Laws in force July 1, 1939*, pp. 64-66.]

## ARTICLE IX

### QUALIFICATION OF VOTERS

1. . . . Every person having resided in this State one year, in the county 90 days, and in the election district 30 days next preceding any election therein, who was an elector in this State on the first day of April, in the year of our Lord 1848, or obtained a certificate of naturalization before any court of record in this State prior to the first day of January, in the year of our Lord 1870, or who shall be a male citizen of the United States, above the age of 21 years, shall be entitled to vote at such election.

2. . . . A permanent abode is necessary to constitute a residence within the meaning of the preceding section.

3. . . . No pauper or inmate of any county poor-house, insane asylum or hospital in this State, shall by virtue of his abode at such county poor-house, insane asylum or hospital be deemed a resident or legal voter in the town, city, village or election district or precinct in which such poor-house, insane asylum or hospital may be situated; but every such person shall be deemed a resident of the town, city, village, or election district or precinct in which he resided next prior to becoming an inmate of such county poor-house, insane asylum or hospital.

4. . . . Every honorably discharged soldier or sailor who shall have been an inmate of any soldiers' and sailors' Home within the State of Illinois for 90 days or longer, and who shall have been a citizen of the United States and resided in this State one year, in the county where any such home is located 90 days, and in the election district 30 days next preceding any election, shall be entitled to vote in the election district in which any such soldiers' and sailors' Home in which he is an inmate thereof as aforesaid is located, for all officers that now are or hereafter

may be elected by the people, and upon all questions that may be submitted to the vote of the people: *Provided*, that he shall declare upon oath, if required so to do by any officer of election in said district, that it was his *bona fide* intention at the time he entered said home to become a resident thereof.

8. . . . No person who has been legally convicted of any crime, the punishment of which is confinement in the penitentiary, or who shall be convicted and sentenced under section 7 of Article XVIII, shall be permitted to vote at any election, unless he shall be restored to the right to vote by pardon; or by the expiration of the term of his disfranchisement under section 7 of Article XIII.

9. . . . That all women, citizens of the United States, being of the age of twenty-one years and upward, having resided in the State one year, in the county ninety days, and in the election district thirty days next preceding any election therein, shall be entitled to vote at such election; and shall not be denied the right to vote at any and all elections by reason of sex; *Provided*, at any such election for which registration is required by any provision of law, women shall register in the same manner as male voters: *Provided, further*, that it shall not be necessary at any election to provide separate ballots or ballot boxes for women.

### 34. FEDERAL ELECTIONS LAW

Although the federal government has little control over elections in general, Congress is given the power to regulate the times, places and manner of electing Senators and Representatives. Its first action under this power was in 1842, when it provided the district system for the election of Representatives. Since that time several other acts have been passed regulating such elections, but the most notable is probably that of 1871, passed especially in view of the adoption of the Fifteenth Amendment. It forms one of the series commonly known as the "Force Acts," and is the only one to have stood the test of constitutionality.<sup>2</sup>

[U. S. Statutes at Large, vol. 16, pp. 433-440.]

CHAP. XCIX. *An Act to amend an Act approved May thirty-one, eighteen hundred and seventy, entitled "An Act to enforce the Rights of Citizens of the United State to vote in the several States of this Union, and for other Purposes."*

<sup>2</sup> The other acts were the Force Act of May 31, 1870, the Ku Klux Klan Act of Apr. 20, 1871, and the Civil Rights Act of Mar. 1, 1875. These were held unconstitutional in *U. S. v. Reese* (1876), 92 U. S. 214; *U. S. v. Harris* (1882), 106 U. S. 629; and *Civil Rights Cases* (1883), 109 U. S. 3.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section twenty of the "Act to enforce the rights of citizens of the United States to vote in the several States of this Union, and for other purposes," approved May thirty-one, eighteen hundred and seventy, shall be, and hereby is, amended so as to read as follows:—

"*Sec. 20. And be it further enacted,* That if, [at] any registration of voters for an election for representative or delegate in the Congress of the United States, any person shall knowingly personate and register, or attempt to register, in the name of any other person, whether living, dead, or fictitious, or fraudulently register, or fraudulently attempt to register, not having a lawful right so to do; or do any unlawful act to secure registration for himself or any other person; or by force, threat, menace, intimidation, bribery, reward, or offer, or promise thereof, or other unlawful means, prevent or hinder any person having a lawful right to register from duly exercising such right; or compel or induce, by any of such means, or other unlawful means, any office of registration to admit to registration any person not legally entitled thereto, or interfere in any manner with any officer of registration in the discharge of his duties, or by any such means, or other unlawful means, induce any officer of registration to violate or refuse to comply with his duty or any law regulating the same; or if any such officer shall knowingly and wilfully register as a voter any person not entitled to be registered, or refuse to so register any person entitled to be registered; or if any such officer or other person whose duty it is to perform any duty in relation to such registration or election, or to ascertain, announce, or declare the result thereof, or give or make any certificate, document, or evidence in relation thereto, shall knowingly neglect or refuse to perform any duty required by law, or violate any duty imposed by law, or do any act unauthorized by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, shall knowingly neglect or refuse to perform any duty required by law relating to or affecting such registration or election, or the result thereof, or any certificate, document, or evidence in relation thereto, or if any person shall aid, counsel, procure, or advise any such voter, person, or officer to do any act hereby made a crime, or to omit any act the omission of which is hereby made a crime, every such person shall be deemed guilty of a crime, and shall be liable to prosecution and punishment therefor as provided in section nineteen of said act of May thirty-one, eighteen hundred and seventy, for persons guilty of any of the crimes therein specified: *Provided,* That every registration made under the laws of any

State or Territory for any State or other election at which such representative or delegate in Congress shall be chosen, shall be deemed to be a registration within the meaning of this act, notwithstanding the same shall also be made for the purpose of any State, territorial, or municipal election."

SEC. 2. *And be it further enacted*, That whenever in any city or town having upward of twenty thousand inhabitants, there shall be two citizens thereof who, prior to any registration of voters for an election for representative or delegate in the Congress of the United States, or prior to any election at which a representative or delegate in Congress is to be voted for, shall make known, in writing, to the judge of the circuit court of the United States for the circuit wherein such city or town shall be, their desire to have said registration, or said election, or both, guarded and scrutinized, it shall be the duty of the said judge of the circuit court, within not less than ten days prior to said registration, if one there be, or, if no registration be required, within not less than ten days prior to said election, to open the said circuit court at the most convenient point in said circuit. And the said court, when so opened by said judge, shall proceed to appoint and commission, from day to day and from time to time, and under the hand of the said circuit judge, and under the seal of said court, for each election district or voting precinct in each and every such city or town as shall in the manner herein prescribed, have applied therefor, and to revoke, change, or renew said appointment from time to time, two citizens, residents of said city or town, who shall be of different political parties, and able to read and write the English language, and who shall be known and designated as supervisors of election. And the said circuit court, when opened by the said circuit judge as required herein, shall therefrom and thereafter, and up to and including the day following the day of election, be always open for the transaction of business under this act, and the powers and jurisdiction hereby granted and conferred shall be exercised as well in vacation as in term time; and a judge sitting at chambers shall have the same powers and jurisdiction, including the power of keeping order and of punishing any contempt of his authority, as when sitting in court.

. . . . .

SEC. 4. *And be it further enacted*, That it shall be the duty of the supervisors of election, appointed under this act, and they and each of them are hereby authorized and required, to attend at all times and places fixed for the registration of voters, who, being registered, would be entitled to vote for a representative or delegate in Congress, and to chal-



lenge any person offering to register; to attend at all times and places when the names of registered voters may be marked for challenge, and to cause such names registered as they shall deem proper to be so marked; to make, when required, the lists, or either of them, provided for in section thirteen of this act, and verify the same; and upon any occasion, and at any time when in attendance under the provisions of this act, to personally inspect and scrutinize such registry, and for purposes of identification to affix their or his signature to each and every page of the original list, and of each and every copy of any such list of registered voters, at such times, upon each day when any name may or shall be received, entered, or registered, and in such manner as will, in their or his judgment, detect and expose the improper or wrongful removal therefrom, or addition thereto, in any way, of any name or names.

SEC. 5. *And be it further enacted*, That it shall also be the duty of the said supervisors of election, and they, and each of them, are hereby authorized and required, to attend at all times and places for holding elections of representatives or delegates in Congress, and for counting the votes cast at said elections; to challenge any vote offered by any person whose legal qualifications the supervisors, or either of them, shall doubt; to be and remain where the ballot-boxes are kept at all times after the polls are open until each and every vote cast at said time and place shall be counted, the canvass of all votes polled be wholly completed, and the proper and requisite certificates or returns made, whether said certificates or returns be required under any law of the United States, or any State, territorial, or municipal law, and to personally inspect and scrutinize, from time to time, and at all times, on the day of election, the manner in which the voting is done, and the way and method in which the poll-books, registry-lists, and tallies or check-books, whether the same are required by any law of the United States, or any State, territorial, or municipal law, are kept; and to the end that each candidate for the office of representative or delegate in Congress shall obtain the benefit of every vote for him cast, the said supervisors of election are, and each of them is, hereby required, in their or his respective election districts or voting precincts, to personally scrutinize, count, and canvass each and every ballot in their or his election district or voting precinct cast, whatever may be the indorsement on said ballot, or in whatever box it may have been placed or be found; to make and forward to the officer who, in accordance with the provisions of section thirteen of this act, shall have been designated as the chief supervisor of the judicial district in which the city or town wherein they or he shall serve shall be, such certificate and returns of all such ballots as said officer may direct and require, and

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(Vote for two)

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FOR STATE SENATOR

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ISSUED BY

*Elmer P. Kuyper*

COUNTY CLERK  
CHAMPAIGN COUNTY



to attach to the registry list, and any and all copies thereof, and to any certificate, statement, or return, whether the same, or any part or portion thereof, be required by any law of the United States, or of any State, territorial, or municipal law, any statement touching the truth or accuracy of the registry, or the truth or fairness of the election and canvass, which the said supervisors of election, or either of them, may desire to make or attach, or which should properly and honestly be made or attached, in order that the facts may become known, any law of any State or Territory to the contrary notwithstanding.

SEC. 19. *And be it further enacted,* That all votes for representatives in Congress shall hereafter be by written or printed ballot, any law of any State to the contrary notwithstanding; and all votes received or recorded contrary to the provisions of this section shall be of none effect.

*Approved,* February 28, 1871.

### 36. VOTING MACHINE

A fairly recent development in election methods is the tendency to substitute voting machines for paper ballots, although in some sections such machines have been used for more than 35 years. They are now authorized in many states, and are being used in about a dozen. Their most widespread use is in New York, where they were introduced into certain up-state cities more than 35 years ago, and in 1925 into New York City, although only after bitter opposition. They are now in general use in the state.

**Diagram of Voting Machine in New York.** (See facing page)

## CHAPTER VII

### THE INITIATIVE, REFERENDUM, AND RECALL

#### 37. THE INITIATIVE AND REFERENDUM

The initiative and referendum are devices for securing more direct popular participation in the legislative process. As such, they were considered rather radical in character, and were first adopted in this country in 1898 by South Dakota, which was then controlled by the Populists. Since that time a considerable number of states have incorporated provisions of a similar character into their constitutions, but still chiefly in the West. However, the persistent demand for the initiative and referendum gradually penetrated even into the East, and a constitutional convention in Massachusetts responded by proposing an amendment embodying these devices, which was adopted in 1918, although by the slender popular majority of 9,000 in a total vote of 333,000. The conservative character of the amendment is shown by the detailed regulations for its application, and particularly by the lengthy list of subjects withdrawn from its operation. The initiative and referendum provisions in South Dakota are, on the other hand, notable for their brevity, the details of their operation being therefore left to the discretion of the legislature.

##### a. The Initiative and Referendum in South Dakota

[South Dakota Constitution, Art. III, Sec. 1, in *South Dakota Manual*, 1925, p. 337.]

The legislative power of the state shall be vested in a legislature which shall consist of a senate and house of representatives, except that the people expressly reserve to themselves the right to propose measures, which measures the legislature shall enact and submit to a vote of the electors of the state, and also the right to require that any laws which the legislature may have enacted shall be submitted to a vote of the electors of the state before going into effect, except such laws as may be necessary for the immediate preservation of the public peace, health or safety, support of the state government and its existing public institutions: Provided, that not more than five per centum of the qualified electors of the state shall be required to invoke either the initiative or the referendum.

This section shall not be construed so as to deprive the legislature or any member thereof of the right to propose any measure. The veto



power of the executive shall not be exercised as to measures referred to a vote of the people. This section shall apply to municipalities. The enacting clause of all laws approved by vote of the electors of the state shall be: "Be it enacted by the people of South Dakota." The legislature shall make suitable provisions for carrying into effect the provisions of this section.

**b. The Initiative and Referendum in Massachusetts**

[Constitution of Massachusetts, Art. XLVIII, in *Manual for the General Court, 1925-6*, pp. 102-112.]

**ARTICLE XLVIII**

**I. DEFINITION**

Legislative power shall continue to be vested in the general court; but the people reserve to themselves the popular initiative, which is the power of a specified number of voters to submit constitutional amendments and laws to the people for approval or rejection; and the popular referendum, which is the power of a specified number of voters to submit laws, enacted by the general court, to the people for their ratification or rejection.

**THE INITIATIVE**

**II. INITIATIVE PETITIONS**

**SEC. 1. Contents.**—An initiative petition shall set forth the full text of the constitutional amendment or law, hereinafter designated as the measure, which is proposed by the petition.

**SEC. 2. Excluded Matters.**—No measure that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal, recall or compensation of judges; or to the reversal of a judicial decision; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that makes a specific appropriation of money from the treasury of the commonwealth, shall be proposed by an initiative petition; but if a law approved by the people is not repealed, the general court shall raise by taxation or otherwise and shall appropriate such money as may be necessary to carry such law into effect.

Neither the eighteenth amendment of the constitution, as approved and ratified to take effect on the first day of October in the year nineteen

hundred and eighteen, nor this provision for its protection, shall be the subject of an initiative amendment.

No proposition inconsistent with any one of the following rights of the individual, as at present declared in the declaration of rights, shall be the subject of an initiative or referendum petition: The right to receive compensation for private property appropriated to public use; the right of access to and protection in courts of justice; the right of trial by jury; protection from unreasonable search, unreasonable bail and the law martial; freedom of the press; freedom of speech; freedom of elections; and the right of peaceable assembly.

No part of the constitution specifically excluding any matter from the operation of the popular initiative and referendum shall be the subject of an initiative petition; nor shall this section be the subject of such a petition.

The limitations on the legislative power of the general court in the constitution shall extend to the legislative power of the people as exercised hereunder.

**SEC. 3. *Mode of Originating.***—Such petition shall first be signed by ten qualified voters of the commonwealth and shall then be submitted to the attorney-general, and if he shall certify that the measure is in proper form for submission to the people, and that it is not, either affirmatively or negatively, substantially the same as any measure which has been qualified for submission or submitted to the people within three years of the succeeding first Wednesday in December and that it contains only subjects not excluded from the popular initiative and which are related or which are mutually dependent, it may then be filed with the secretary of the commonwealth. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed measure as such description will appear on the ballot together with the names and residences of the first ten signers. All initiative petitions, with the first ten signatures attached, shall be filed with the secretary of the commonwealth not earlier than the first Wednesday of the September before the assembling of the general court into which they are to be introduced and the remainder of the required signatures shall be filed not later than the first Wednesday of the following December.

**SEC. 4. *Transmission to the General Court.***—If an initiative petition, signed by the required number of qualified voters, has been filed as aforesaid, the secretary of the commonwealth shall, upon the assembling of the general court, transmit it to the clerk of the house of representatives, and the proposed measure shall then be deemed to be introduced and pending.

### III. LEGISLATIVE ACTION. GENERAL PROVISIONS

SEC. 1. *Reference to Committee.*—If a measure is introduced into the general court by initiative petition, it shall be referred to a committee thereof, and the petitioners and all parties in interest shall be heard, and the measure shall be considered and reported upon to the general court with the committee's recommendations, and the reasons therefor, in writing. Majority and minority reports shall be signed by the members of said committee.

SEC. 2. *Legislative Substitutes.*—The general court may, by resolution passed by yea and nay vote, either by the two houses separately, or in the case of a constitutional amendment by a majority of those voting thereon in joint session in each of two years as hereinafter provided, submit to the people a substitute for any measure introduced by initiative petition, such substitute to be designated on the ballot as the legislative substitute for such an initiative measure and to be grouped with it as an alternative therefor.

### IV. LEGISLATIVE ACTION ON PROPOSED CONSTITUTIONAL AMENDMENTS

SEC. 2. *Joint Session.*—If a proposal for a specific amendment of the constitution is introduced into the general court by initiative petition signed by not less than twenty-five thousand qualified voters, or if in case of a proposal for amendment introduced into the general court by a member of either house, consideration thereof in joint session is called for by vote of either house, such proposal shall, not later than the second Wednesday in June, be laid before a joint session of the two houses, at which the president of the senate shall preside; and if the two houses fail to agree upon a time for holding any joint session hereby required, or fail to continue the same from time to time until final action has been taken upon all amendments pending, the governor shall call such joint session or continuance thereof.

SEC. 3. *Amendment of Proposed Amendments.*—A proposal for an amendment to the constitution introduced by initiative petition shall be voted upon in the form in which it was introduced, unless such amendment is amended by vote of three-fourths of the members voting thereon in joint session, which vote shall be taken by call of the yeas and nays if called for by any member.

SEC. 4. *Legislative Action.*—Final legislative action in the joint session upon any amendment shall be taken only by call of the yeas and

nays, which shall be entered upon the journals of the two houses; and an unfavorable vote at any stage preceding final action shall be verified by call of the yeas and nays, to be entered in like manner. At such joint session a legislative amendment receiving the affirmative votes of a majority of all the members elected, or an initiative amendment receiving the affirmative votes of not less than one-fourth of all the members elected, shall be referred to the next general court.

SEC. 5. *Submission to the People.*—If in the next general court a legislative amendment shall again be agreed to in joint session by a majority of all the members elected, or if an initiative amendment or a legislative substitute shall again receive the affirmative votes of at least one-fourth of all the members elected, such fact shall be certified by the clerk of such joint session to the secretary of the commonwealth, who shall submit the amendment to the people at the next state election. Such amendment shall become part of the constitution if approved, in the case of a legislative amendment, by a majority of the voters voting thereon, or if approved, in the case of an initiative amendment or a legislative substitute, by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such amendment.

#### V. LEGISLATIVE ACTION ON PROPOSED LAWS

SEC. 1. *Legislative Procedure.*—If an initiative petition for a law is introduced into the general court, signed by not less than twenty thousand qualified voters, a vote shall be taken by yeas and nays in both houses before the first Wednesday of June upon the enactment of such law in the form in which it stands in such petition. If the general court fails to enact such law before the first Wednesday of June, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following July nor later than the first Wednesday of the following August, not less than five thousand signatures of qualified voters, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of June aforesaid, then the secretary of the commonwealth shall submit such proposed law to the people at the next state election. If it shall be approved by voters equal in number to at least thirty per cent of the total number of ballots cast at such state election and also by a majority of the voters voting on such law, it shall become law, and shall take effect in thirty days after such state election or at such time after such election as may be provided in such law.

SEC. 2. *Amendment by Petitioners.*—If the general court fails to pass a proposed law before the first Wednesday of June, a majority of the first ten signers of the initiative petition therefor shall have the right, subject to certification by the attorney-general filed as hereinafter provided, to amend the measure so amended which is the subject of such petition. An amendment so made shall not invalidate any signature attached to the petition. If the measure so amended, signed by a majority of the first ten signers, is filed with the secretary of the commonwealth before the first Wednesday of the following July, together with a certificate signed by the attorney-general to the effect that the amendment made by such proposers is in his opinion perfecting in its nature and does not materially change the substance of the measure, and if such petition is completed by filing with the secretary of the commonwealth, not earlier than the first Wednesday of the following July nor later than the first Wednesday of the following August, not less than five thousand signatures of qualified voters, in addition to those signing such initiative petition, which signatures must have been obtained after the first Wednesday of June aforesaid, then the secretary of the commonwealth shall submit the measure to the people in its amended form.

#### VI. CONFLICTING AND ALTERNATIVE MEASURES

If in any judicial proceeding, provisions of constitutional amendments or of laws approved by the people at the same election are held to be in conflict, then the provisions contained in the measure that received the largest number of affirmative votes at such election shall govern.

A constitutional amendment approved at any election shall govern any law approved at the same election. . . .

### THE REFERENDUM

#### I. WHEN STATUTES SHALL TAKE EFFECT

No law passed by the general court shall take effect earlier than ninety days after it has become a law, excepting laws declared to be emergency laws and laws which may not be made the subject of a referendum petition, as herein provided.

#### II. EMERGENCY MEASURES

A law declared to be an emergency law shall contain a preamble setting forth the facts constituting the emergency, and shall contain the statement that such law is necessary for the immediate preservation of the

public peace, health, safety or convenience. A separate vote shall be taken on the preamble by call of the yeas and nays, which shall be recorded, and unless the preamble is adopted by two-thirds of the members of each house voting thereon, the law shall not be an emergency law; but if the governor, at any time before the election at which it is to be submitted to the people on referendum, files with the secretary of the commonwealth a statement declaring that in his opinion the immediate preservation of the public peace, health, safety or convenience requires that such law should take effect forthwith and that it is an emergency law and setting forth the facts constituting the emergency, then such law, if not previously suspended as hereinafter provided, shall take effect without suspension, or if such law has been so suspended such suspension shall thereupon terminate and such law shall thereupon take effect: but no grant of any franchise or amendment thereof, or renewal or extension thereof for more than one year shall be declared to be an emergency law.

### III. REFERENDUM PETITIONS

SEC. 1. *Contents.*—A referendum petition may ask for a referendum to the people upon any law enacted by the general court which is not herein expressly excluded.

SEC. 2. *Excluded Matters.*—No law that relates to religion, religious practices or religious institutions; or to the appointment, qualification, tenure, removal or compensation of judges; or to the powers, creation or abolition of courts; or the operation of which is restricted to a particular town, city or other political division or to particular districts or localities of the commonwealth; or that appropriates money for the current or ordinary expenses of the commonwealth or for any of its departments, boards, commissions or institutions shall be the subject of a referendum petition.

SEC. 3. *Mode of Petitioning for the Suspension of a Law and a Referendum thereon.*—A petition asking for a referendum on a law, and requesting that the operation of such law be suspended, shall first be signed by ten qualified voters and shall then be filed with the secretary of the commonwealth not later than thirty days after the law that is the subject of the petition has become law. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed law as such description will appear on the ballot together with the names and residences of the first ten signers. If such petition is completed by filing with the secretary of the commonwealth not later than ninety days after the law which is the subject of the petition has become law the signatures of not



less than fifteen thousand qualified voters of the commonwealth, then the operation of such law shall be suspended, and the secretary of the commonwealth shall submit such law to the people at the next state election, if thirty days intervene between the date when such petition is filed with the secretary of the commonwealth and the date for holding such state election; if thirty days do not so intervene, then such law shall be submitted to the people at the next following state election, unless in the meantime it shall have been repealed; and if it shall be approved by a majority of the qualified voters voting thereon, such law shall, subject to the provisions of the constitution, take effect in thirty days after such election, or at such time after such election as may be provided in such law; if not so approved such law shall be null and void; but no such law shall be held to be disapproved if the negative vote is less than thirty per cent of the total number of ballots cast at such state election.

SEC. 4. *Petitions for Referendum on an Emergency Law or a Law the Suspension of which is not asked for.*—A referendum petition may ask for the repeal of an emergency law or a law which takes effect because the referendum petition does not contain a request for suspension, as aforesaid. Such petition shall first be signed by ten qualified voters of the commonwealth, and shall then be filed with the secretary of the commonwealth not later than thirty days after the law which is the subject of the petition has become law. The secretary of the commonwealth shall provide blanks for the use of subsequent signers, and shall print at the top of each blank a description of the proposed law as such description will appear on the ballot together with the names and residences of the first ten signers. If such petition filed as aforesaid is completed by filing with the secretary of the commonwealth not later than ninety days after the law which is the subject of the petition has become law the signatures of not less than ten thousand qualified voters of the commonwealth protesting against such law and asking for a referendum thereon, then the secretary of the commonwealth shall submit such law to the people at the next state election, if thirty days intervene between the date when such petition is filed with the secretary of the commonwealth and the date for holding such state election. If thirty days do not so intervene, then it shall be submitted to the people at the next following state election, unless in the meantime it shall have been repealed; and if it shall not be approved by a majority of the qualified voters voting thereon, it shall, at the expiration of thirty days after such election, be thereby repealed; but no such law shall be held to be disapproved if the negative vote is less than thirty per cent of the total number of ballots cast at such state election.

## GENERAL PROVISIONS

## I. IDENTIFICATION AND CERTIFICATION OF SIGNATURES

Provision shall be made by law for the proper identification and certification of signatures to the petitions hereinbefore referred to, and for penalties for signing any such petition, or refusing to sign it, for money or other valuable consideration, and for the forgery of signatures thereto. Pending the passage of such legislation all provisions of law relating to the identification and certification of signatures to petitions for the nomination of candidates for state offices or to penalties for the forgery of such signatures shall apply to the signatures to the petitions herein referred to. The general court may provide by law that no co-partnership or corporation shall undertake for hire or reward to circulate petitions, may require individuals who circulate petitions for hire or reward to be licensed, and may make other reasonable regulations to prevent abuses arising from the circulation of petitions for hire or reward.

## II. LIMITATION ON SIGNATURES

Not more than one-fourth of the certified signatures on any petition shall be those of registered voters of any one county.

## III. FORM OF BALLOT

Each proposed amendment to the constitution, and each law submitted to the people, shall be described on the ballots by a description to be determined by the attorney-general, subject to such provision as may be made by law, and the secretary of the commonwealth shall give each question a number and cause such question, except as otherwise authorized herein, to be printed on the ballot in the following form:

In the case of an amendment to the constitution: Shall an amendment to the constitution (here insert description, and state, in distinctive type, whether approved or disapproved by the general court, and by what vote thereon) be approved?

In the case of a law: Shall a law (here insert description, and state, in distinctive type, whether approved or disapproved by the general court, and by what vote thereon) be approved?

Yes.	
No.	
Yes.	
No.	

IV. INFORMATION FOR VOTERS

The secretary of the commonwealth shall cause to be printed and sent to each registered voter in the commonwealth the full text of every measure to be submitted to the people, together with a copy of the legislative committee's majority and minority reports, if there be such, with the names of the majority and minority members thereon, a statement of the votes of the general court on the measure, and a description of the measure as such description will appear on the ballot; and shall, in such manner as may be provided by law, cause to be prepared and sent to the voters other information and arguments for and against the measure.

V. THE VETO POWER OF THE GOVERNOR

The veto power of the governor shall not extend to measures approved by the people.

VI. THE GENERAL COURT'S POWER OF REPEAL

Subject to the veto power of the governor and to the right of referendum by petition as herein provided, the general court may amend or repeal a law approved by the people.

VII. AMENDMENT DECLARED TO BE SELF-EXECUTING

This article of amendment to the constitution is self-executing, but legislation not inconsistent with anything herein contained may be enacted to facilitate the operation of its provisions.

38. THE ILLINOIS PUBLIC POLICY LAW

This law, enacted in 1901 and still in force, is not a true initiative but represents an attempt to give the people some voice in legislation without making their action legally controlling. It allows an expression of opinion by the people that such and such a law should be enacted, but leaves the legislature free to ignore such expression of opinion if it sees fit. In practice, the legislature has frequently done so, with the result that the law is not as frequently invoked now as it was soon after its enactment.

[*Laws of Illinois, 1901, p. 198.*]

*An Act providing for an expression of opinion by electors on questions of public policy at any general or special election.*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly: That on a written petition signed by*

twenty-five per cent of the registered voters of any incorporated town, village, city, township, county or school district; or ten per cent of the registered votes [voters] of the State, it shall be the duty of the proper election officers in each case to submit any question of public policy so petitioned for, to the electors of the incorporated town, village, city, township, county, school district or State, as the case may be, at any general or special election named in the petition: *Provided*, such petition is filed with the proper election officers, in each case not less than sixty (60) days before the date of the election at which the question or questions petitioned for are to be submitted. Not more than three propositions shall be submitted at the same election, and such proposition shall be submitted in the order of its filing.

§ 2. Every question submitted to electors shall be printed in plain, prominent type upon a separate ballot, in form required by law, the same as a constitutional amendment or other public measure proposed to be voted upon by the people.

APPROVED May 11, 1901.

### 39. PROBLEMS OF THE INITIATIVE AND REFERENDUM

The introduction of the initiative and referendum in various states has brought with it a number of problems whose solution is by no means simple. In the following selection some of the more important of these problems are stated and possible solutions indicated.

[*Illinois Constitutional Convention Bulletins, 1920, pp. 110-116.*]

**General statement:** In connection with the initiative and referendum several distinct problems present themselves:

- (a) The drafting of the measure to be submitted under the initiative;
- (b) The obtaining of initiative or referendum petitions;
- (c) The submission of measures in such a manner that they may be acted upon intelligently by the voters, and
- (d) The popular vote upon proposals.

**Draftsmanship:** It may of course be truly said that draftsmanship of laws enacted by representative legislatures is defective, and that the draftsmanship of initiated laws is not materially worse than much of the draftsmanship of laws enacted under the representative system. However this does not deny the need for more expert draftsmanship, but rather asserts the need for such draftsmanship as to representative legislative action as well as with reference to initiated measures, if the initiative is to be adopted.

The relationship between direct and indirect initiation of measures

under existing constitutional provisions has already been discussed, and this discussion has a direct bearing upon the problem of draftsmanship of initiated measures. In the states which permit the legislative proposal of alternative measures, the two proposed measures then going to a vote of the people, there is of course no opportunity for improving the initiated measure, and there is an added complexity in the issue presented to the voters. In states where, as in Ohio and Massachusetts, there is an indirect initiative with a possibility of correcting a measure upon the basis of legislative deliberation, there is a possibility of improving the quality of the measure before it is finally submitted to the popular vote. This was also true under the rejected Wisconsin plan and under a possible combination of the Wisconsin plan with a suggested amendment which was rejected by the general assembly in Illinois in 1913.

Any plan which enables a small group of persons to force a vote upon a proposal without possibility of revision, is to that extent defective. Legislative deliberation upon a proposed draft of a measure is of value, and such deliberation is possible under the Ohio and Massachusetts plans. Under these plans of course there is a somewhat greater degree of delay in submitting measures to a popular vote, unless a special election is called, and special elections are of course expensive.

**Petitions:** . . . The size of petitions varies considerably in the several states. The obtaining of petitions is a matter of some difficulty and expense even though it be recognized that a large number of people sign petitions without very much thought. The obtaining of an 8 per cent petition for an initiative measure becomes of course more difficult the larger the number of voters. The granting of woman's suffrage in Oregon has probably had an appreciable effect upon the number of initiative proposals. In a state like Illinois the difficulty becomes greater, and will be increased by the granting of woman's suffrage. Large petitions on the other hand do not necessarily represent a large sentiment in the community in favor of a measure.

A small petition obtained under careful safeguards is likely to represent much more of an actual public sentiment than a large petition obtained through the hiring of "professional signature getters." A plan such as that which is made optional in Washington, of leaving petitions with registration officers, has distinct merit, although such a plan would materially increase the difficulty of obtaining a large petition.

In a number of states a certain geographical distribution of petitioners is required, and this seems desirable in order to make sure that the measure being petitioned for is not merely one sought by people in a particular community. However, the state of Illinois presents a problem some-

what different from that of almost all of the states which have adopted the initiative and the referendum, although Maryland and Massachusetts are perhaps most comparable. In the state of Illinois there is one county with very nearly half of the population of the state, and some method will have to be devised to make sure that initiative petitions represent not merely a sentiment within that county, and also that the initiative and referendum if adopted will not be employed to impose legislation upon that county by the rest of the state.

If an initiation is to be indirect, with a possibility of amending the proposal before its submission, upon the basis of legislative deliberation there may be no great need for a large petition. In fact the need for a petition to present the measure to the legislature hardly exists at all, and if a plan of this sort be adopted, the petition may come after the legislative deliberation as in the case of the Ohio supplementary petition. In such a case a petition need not be large, if it may be employed only in the case where a proposed measure has received the support of a certain number of members of the general assembly.

**Submission to the voters:** The problems of ballot title and of arguments upon measures may properly be left to the legislature, although these are highly important matters from the standpoint of any effective operation of the initiative and the referendum.

Under the constitutional provisions of a number of states alternative and competing measures are expressly permitted, several states providing that alternative measures shall be submitted in such a way that the vote shall be in the alternative. The submission of directly competing measures, either by provisions for alternative measures or otherwise, is apt to lead to grave confusion in the minds of most intelligent voters, and this plan should be avoided if possible in the adoption of any initiative and referendum scheme.

A popular vote is of little value:

- (1) If the questions submitted are so trivial or so local in character as not to be of interest to those to whom they are submitted.
- (2) If the questions are so complicated and technical that the voter has no satisfactory means of informing himself regarding them.
- (3) If the questions are submitted in such great number that the voter, even if he might possibly render a satisfactory judgment upon any one of them, can not inform himself regarding the merits of all the measures upon which he must pass.

It has already been suggested that many constitutional amendments submitted to voters are local or trivial, and the same statement may be made of many laws or proposed laws submitted through the initiative



and referendum. However, the legislative proposals submitted through the initiative and referendum have in the main related to matters of general interest. The publishing of arguments upon measures of course meets in part the problem of informing voters upon matters to be submitted to them, although it can hardly be said that the so-called publicity pamphlets have in any state fully and satisfactorily informed the voters upon all measures to be submitted.

If the initiative and referendum are to be adopted, however, it seems unwise to specify in detail matters to which they are not to be made applicable. This plan which has been adopted in Massachusetts seems less desirable than some plan of applying the initiative and referendum so that it will limit itself automatically to matters of distinct general interest.

**Popular vote:** . . . The more common provision in this country is that measures submitted to the people shall be adopted upon approval by a majority of those voting thereon. The experience of Colorado in the adoption of a number of important matters when less than 30 per cent of the voters expressed themselves either way, raises some doubt as to the validity of the plan of adopting merely upon the vote of the majority of those voting thereon. It is, of course, at the same time quite clear that to require a majority of those voting at a general election makes the institution substantially unworkable, no matter how great the popular interest may be, and this statement is particularly applicable with respect to the present constitutional provisions of Illinois regarding the amendment of the constitution.

A great deal has of course been said about the initiative and referendum as minority government, under any plan which provides for the adoption of a measure without a majority of the total vote at a general election. Of course it may be replied to this that very little of our government in the election of public officers is majority government. A plurality elects the highest state officers, as a plurality of the popular vote has often resulted in the election of a president. This statement applies to the heads of tickets who obtain the highest vote, the vote by which, generally, the highest vote in an election is measured, when a proposed measure requires for its adoption a majority of the total vote in the election. When examination is made of those offices which appear lower upon a ticket in a general election, it will often be found that elections are determined by a plurality of the votes, and it will frequently be found that the total vote for such lesser officers is much less than that for the more important offices in the election. It is probably true that the majorities of many state legislatures are majorities elected not by a majority of the total vote at a general election, and it is sometimes true that

the majorities in state legislatures may represent a very distinct minority of the total popular vote.

In view of this fact there is much plausibility in the statement that a total affirmative vote of 35 per cent such as is required in Nebraska for the adoption of popular measures, represents fully as much of a popular expression as does the voting upon candidates for the legislature.

However this may be, it is true that if the initiative and referendum are to be adopted, to require a majority of the highest vote cast in a general election in order to carry measures submitted to popular vote is to make such an institution substantially unworkable. If the initiative and referendum are to be adopted and are to be employed as instruments of government some other basis is likely to be taken.

In this connection, reference should be made to the influence of the form of ballot upon popular voting on measures. A full discussion of this subject will be found in the pamphlet dealing with the subject of the amending article of the constitution. With a ballot such as that now used in Illinois, the requirement of a majority of those voting at a general election has the effect of counting in the negative all who do not vote on the question. However, it is possible to devise a ballot which will accomplish precisely the opposite result.

**Emergency measures and the referendum:** Most of the states which have the initiative and referendum make a distinction between emergency measures which shall not be subject to the referendum and other measures which shall be subject to the referendum upon petition. In a number of cases legislative measures which are to go into effect at once must be adopted by higher legislative majorities. The distinction between emergency and other measures is of course based upon the notion that other measures shall be suspended for a certain time after legislative passage to await a possible referendum petition. In a few cases the plan has been adopted of discarding the distinction between emergency and other measures, thus permitting all measures to come into effect at once subject to a popular referendum which will operate as a repeal. Such a plan does away with two very serious difficulties under the plan which contemplates emergency measures:

(a) The declaration of emergencies in cases where no real emergency exists in order to avoid the referendum. In some states this of course would not avoid the referendum, but would lead almost necessarily to litigation as to whether the emergency actually exists.

(b) The filing of a referendum petition as a means of delaying the operation of a measure enacted by the legislature, with little or no notion that the measure would finally be rejected by the people.

Of course the plan of bringing all laws into operation at once, subject merely to a repeal by means of a referendum, would be open to some abuse in that the result sought by the measure might be accomplished before the possibility of such repeal. The plan here referred to, however, could be tied up with a plan for special elections in exceptional cases. There is a tendency to prohibit the use of the referendum upon regular appropriations, and it is with respect to regular appropriations that the lapse of time would in most cases involve the accomplishment of the purpose sought by the legislation.

**Relation between the initiative and referendum and the regular legislature:** The tables already given indicate perhaps with sufficient clearness that the initiative and referendum are not in any detailed way substitutes for the ordinary process of legislation, although several of the elections (separately analyzed) would seem to indicate that in certain instances this might be the case.

For example, in South Dakota between the years 1899 and 1917, two thousand five hundred and seventy-three laws were passed, whereas seventy-three acts and constitutional amendments were submitted to a popular vote, and of these fifty were proposed constitutional amendments, leaving but twenty-three as submissions of laws, and of the laws submitted but eight were adopted. For the state of Oregon between the years 1904 and 1919, two thousand six hundred and fifty-four laws were passed by the legislature. During the same period one hundred and seventy measures were submitted to a popular vote, of which eighty were proposed constitutional amendments, leaving but ninety proposed laws submitted to the people, of which thirty-five were adopted. However there have been some tendencies in the initiative and referendum toward the provisions which will necessarily increase the number of measures to be submitted to the people. In a number of states there has been a tendency to provide that laws enacted by the initiative, and in some cases that laws submitted to and approved upon a referendum, shall be amended or repealed only upon the basis of a popular vote. Repeals or amendments of such laws would without such a provision normally be subject to a popular vote if the people were sufficiently interested to submit a referendum petition, and there is a distinct disadvantage in making it necessary to submit such measures to the people. Provisions of the sort just referred to increase the compulsory referendum; that is, make a popular vote necessary in order to accomplish a certain purpose, and as has been suggested above, the compulsory referendum, as distinguished from the optional, is now responsible for the submission, not only of the greater number of measures, but also for the submission to the people of

a great mass of immaterial detail for whose submission in a great number of cases there has been and would have been no popular demand.

In some states also there is a tendency toward making the use of the initiative easier than the use of the representative body. The constitutional provisions in Nebraska, Arkansas and Mississippi regarding the adoption of constitutional amendments make the passage and adoption of amendments by initiative petitions substantially easier than the adoption of such amendments upon the basis of legislative proposal. The necessary result of this will be to force the use of the initiative as distinguished from the ordinary legislative process. The Nevada constitutional provision previously referred to is one which may be construed as requiring a popular vote to amend or repeal any act of the legislature which has been approved upon a popular referendum, and if so construed would be a distinct means of giving preference to a compulsory popular vote upon measures as distinct from the ordinary legislative procedure.

**Relation between the initiative and referendum and the constitution:** . . . The initiative and referendum provisions of Oregon, Nevada, Missouri, Arkansas, Colorado and Mississippi permit the proposal and adoption of constitutional amendments through the initiative and referendum by precisely the same methods as are employed with respect to the proposal and adoption of ordinary laws. The California constitutional provisions for the initiative and referendum make substantially no difference between the proposal and adoption of constitutional amendments and of ordinary legislation, and little difference is made by the constitution of Michigan. This means that in their formal aspects of proposal and adoption constitutional amendments are in these states placed upon the same basis as ordinary legislation. Not only this, but the requirement in a number of states that amendments or repeals of laws approved by the people be enacted only upon a popular vote places the amendment and repeal of such legislation upon substantially the same basis, establishing a compulsory referendum for such amendments and repeals in the same manner as for constitutional amendments.

Of course, the constitutional referendum already existed before the adoption of the initiative and referendum for ordinary legislation, but it is possible, as has been done in a number of states, in adopting the initiative and referendum, to continue some formal distinction between statutes and constitutional changes.

Votes under a compulsory referendum have steadily tended to increase in this country, even before the adoption of the initiative and referendum, and this increase in compulsory referenda (that is, in the measures which must be submitted to the people if changes are to be made)

# SA Minnehaha C

Electors desiring to vote "Yes" place a cross in the square before

The following laws have no ing the same. These laws ha filed in accordance with the C

from Vermillion, Clay County, to Sioux Falls, and a vote of 1862, stated by the First Territorial Legislature by the State University has been established and located in Vermillion, Clay County, South Dakota, and to

from Vermillion, Clay County, to Sioux Falls,

ions of this act. is in favor of leaving the law as it exists, and

ng business, and for the purpose of carrying out the Industrial Commission will be authorized operation of the bank, and may employ a of the negotiable bonds of the State of South by the negotiation and sale of these bonds will state, county and rural credits, township, municipality, and all other public funds, shall be deposited in the State and are exempt from state.

State of South Dakota to engage in the banking operated by the State, and defining the scope and provisions of the appropriation therefor; and pro-

etc., ballet, farce, negro minstrelsy, sparring any circus, equestrian, dramatic performance or use ball games, where an admission fee is charged game as a condition of witnessing the same by the game, exercise or game, advertisement, posting or leases or lets the game for the purpose of such ex- poses on Sunday, is guilty of a misdemeanor. ode of 1919, as above set forth.

AN ACT ENTITLED, An Act Relating Means of a State Constructed, On Explanatory statement by the Att The purpose and effect of the own, maintain and operate hydro-electric plants are to be located on the Missouri cated about four miles above the city of and distribute such electric current to his own use, or for distribution. The mission known as the South Dakota H Senate. The measure, upon becoming may deem expedient, at a rate of interest and operating said hydro-electric power (\$200,000) until the Commission has s of the State is pledged for the payment plant, after ten years expiration, are fo A vote "Yes" is in favor of changi "No" is in favor of leaving the law as

☐ YES. Shall the above measure beco  
☐ NO

AN ACT ENTITLED, An Act to Repeal Explanatory statement by the Attol The purpose and effect of the, aboi Sections 10226 to 10234 of the Revised a State Sheriff who is at the head of th tute the State Constabulary. The purpo riots, prevent affrays and preserve and duty of the State Sheriff to supervise and tion, manufacture, sale, bartering, giving liquor traffic.

A vote "Yes" is in favor of changi indicated. A vote "No" is in favor of

☐ YES Shall the above measure beco  
☐ NO

AN ACT ENTITLED, An Act Repealing





stitutional amendment, introduced by Representative Ludlow (Ind.) in 1937 and defeated by a close vote in 1938. In connection with the consideration of the Neutrality Act of 1939, Senator LaFollette (Wis.) proposed an advisory referendum on war, which was also defeated and by an overwhelming vote. There, however, an increasing interest in the possibility of more popular control over important national policy as well as over state and local policy.

#### a. Ludlow Proposal for Constitutional Amendment

[H. J. Res. 199, 75 Cong., introduced in House Feb. 5, 1937; motion for discharge rule defeated Jan. 10, 1938 (188-209). Text in *Congressional Record*, vol. 83, pt. 1, p. 278.]

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by conventions in three-fourths of the States as provided in the Constitution*

#### "ARTICLE —

SECTION 1. Except in case of attack by armed forces, actual or immediately threatened, upon the United States or its territorial possessions or by any non-American nation against any country in the Western Hemisphere, the people shall have the sole power by a national referendum to declare war or to engage in warfare overseas. Congress, when it deems a national crisis to exist in conformance with this article, shall by concurrent resolution refer the question to the people.

SEC. 2. Congress shall by law provide for the enforcement of this section.

SEC. 3. This article shall become operative when ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution."

#### b. LaFollette Proposal for Advisory Referendum

[Offered in Senate as an amendment to Neutrality Resolution, Oct. 27, 1939, debated immediately and defeated (17-73). *Congressional Record*, vol. 85, pt. 1, pp. 986-1000.]

THE LEGISLATIVE CLERK. It is proposed to insert the following new section at the end of the joint resolution:

SEC. —. (a) Except in case of attack by armed forces, actual or immediately threatened, upon the United States or its Territorial posses-

sions, or by any non-American nation against any country in the Western Hemisphere, a national advisory election shall be held in the several States upon the question of war or peace prior to any declaration of war by the Congress.

(b) Every citizen of the United States qualified to vote according to the laws of the State of which he or she is a resident shall be entitled to vote at such election. Such election shall be held and conducted under such rules and regulations as may be prescribed by the United States Referendum Election Board, except that such election shall be by secret written ballot and shall be conducted as nearly as possible in accordance with the laws of the several States for the conduct of their respective State elections.

(c) There is hereby created a United States Referendum Election Board (hereinafter referred to in this section as the "Board"), to be composed of the President of the Senate, three members of the Senate Committee on Foreign Relations to be appointed by the President of the Senate and of whom not more than two shall be members of the same political party, three members of the Committee on Foreign Affairs of the House of Representatives to be appointed by the Speaker of the House of Representatives and of whom not more than two shall be members of the same political party. Any vacancy in the membership of the Board shall be filled in the same manner as in the case of an original appointment. The President of the Senate shall be chairman of the Board ex officio, but shall have no vote except in case of an even division between the members. The members of the Board shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the exercise of the functions vested in the Board.

(d) The national advisory election herein provided for shall be called whenever four or more members of the Board shall file with the Secretary of State of the United States a written demand therefor. The question to be submitted at the election shall be, "Under existing conditions shall the United States go to war?" The Secretary of State shall by proclamation fix the day of the election, which shall be held not less than 15 days from the filing with him of the demand for the election as herein provided.

(e) In conducting any such election, the Board shall, so far as practicable, use the election officials and the polling places provided for by the laws of the several States.

(f) There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be neces-

stitutional amendment, introduced by Representative Ludlow (Ind.) in 1937 and defeated by a close vote in 1938. In connection with the consideration of the Neutrality Act of 1939, Senator LaFollette (Wis.) proposed an advisory referendum on war, which was also defeated and by an overwhelming vote. There is, however, an increasing interest in the possibility of more popular control of important national policy as well as over state and local policy.

### a. Ludlow Proposal for Constitutional Amendment

[H. J. Res. 199, 75 Cong., introduced in House Feb. 5, 1937; motion for discharge rule defeated Jan. 10, 1938 (188-209). Text in *Congressional Record*, vol. 83, pt. 1, p. 278.]

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled (two-thirds of each House concurring therein), That the following article is proposed as an amendment to the Constitution of the United States, which shall be valid to all intents and purposes as a part of the Constitution when ratified by conventions in three-fourths of the States as provided in the Constitution*

#### "ARTICLE —

SECTION 1. Except in case of attack by armed forces, actual or immediately threatened, upon the United States or its territorial possession or by any non-American nation against any country in the Western Hemisphere, the people shall have the sole power by a national referendum to declare war or to engage in warfare overseas. Congress, when it deems a national crisis to exist in conformance with this article, shall by concurrent resolution refer the question to the people.

SEC. 2. Congress shall by law provide for the enforcement of this section.

SEC. 3. This article shall become operative when ratified as an amendment to the Constitution by conventions in the several States, as provided in the Constitution."

### b. LaFollette Proposal for Advisory Referendum

[Offered in Senate as an amendment to Neutrality Resolution, Oct. 27, 1939, debated immediately and defeated (17-73). *Congressional Record*, vol. 85, pt. 1, pp. 986-1000.]

THE LEGISLATIVE CLERK. It is proposed to insert the following new section at the end of the joint resolution:

SEC. —. (a) Except in case of attack by armed forces, actual or immediately threatened, upon the United States or its Territorial posses-

sions, or by any non-American nation against any country in the Western Hemisphere, a national advisory election shall be held in the several States upon the question of war or peace prior to any declaration of war by the Congress.

(b) Every citizen of the United States qualified to vote according to the laws of the State of which he or she is a resident shall be entitled to vote at such election. Such election shall be held and conducted under such rules and regulations as may be prescribed by the United States Referendum Election Board, except that such election shall be by secret written ballot and shall be conducted as nearly as possible in accordance with the laws of the several States for the conduct of their respective State elections.

(c) There is hereby created a United States Referendum Election Board (hereinafter referred to in this section as the "Board"), to be composed of the President of the Senate, three members of the Senate Committee on Foreign Relations to be appointed by the President of the Senate and of whom not more than two shall be members of the same political party, three members of the Committee on Foreign Affairs of the House of Representatives to be appointed by the Speaker of the House of Representatives and of whom not more than two shall be members of the same political party. Any vacancy in the membership of the Board shall be filled in the same manner as in the case of an original appointment. The President of the Senate shall be chairman of the Board ex officio, but shall have no vote except in case of an even division between the members. The members of the Board shall serve without additional compensation, but shall be reimbursed for travel, subsistence, and other necessary expenses incurred by them in the exercise of the functions vested in the Board.

(d) The national advisory election herein provided for shall be called whenever four or more members of the Board shall file with the Secretary of State of the United States a written demand therefor. The question to be submitted at the election shall be, "Under existing conditions shall the United States go to war?" The Secretary of State shall by proclamation fix the day of the election, which shall be held not less than 15 days from the filing with him of the demand for the election as herein provided.

(e) In conducting any such election, the Board shall, so far as practicable, use the election officials and the polling places provided for by the laws of the several States.

(f) There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, such sums as may be neces-

sary to enable the Board to carry out its functions and duties, and the Board is specifically authorized and empowered to make arrangements with the Governors of the several States, or other appropriate State officers, or with towns, cities, villages, and counties or their respective officers, for using the State or local election officers, employees, and equipment in the conduct of the said election, and the costs and expenses for holding the said election shall be paid for at the same rate as may be provided by the laws of the respective States.

(g) The Board shall make public immediately the results of each national advisory election, together with the number of votes cast in each State for and against the question submitted at the election.

### c. View of President Roosevelt

[Letter to Speaker Bankhead, Jan. 6, 1938. Text in *Congressional Record*, vol. 83, pt. 1, p. 277 (Jan. 10, 1938).]

THE WHITE HOUSE,  
Washington, January 6, 1938.

MY DEAR MR. SPEAKER: In response to your request for an expression of my views respecting the proposed resolution calling for a referendum vote as a prerequisite for a declaration of war, I must frankly state that I consider that the proposed amendment would be impracticable in its application and incompatible with our representative form of government.

Our Government is conducted by the people through representatives of their own choosing. It was with singular unanimity that the founders of the Republic agreed upon such free and representative form of government as the only practical means of government by the people.

Such an amendment to the Constitution as that proposed would cripple any President in his conduct of our foreign relations, and it would encourage other nations to believe that they could violate American rights with impunity.

I fully realize that the sponsors of this proposal sincerely believe that it would be helpful in keeping the United States out of war. I am convinced it would have the opposite effect.

Yours very sincerely,

FRANKLIN D. ROOSEVELT.

The Honorable WILLIAM B. BANKHEAD,  
*Speaker of the House of Representatives.*

## 42. THE RECALL

The Articles of Confederation provided for the recall of members of Congress by the various states, but the popular recall, as we now know it, is fairly recent in origin and is found mainly in Western states. It was first adopted in this country by Oregon in 1908, and has since been incorporated into the constitutions of a number of states. The Arizona provision is of special interest on account of the peculiar circumstances in connection with its adoption. When Arizona was seeking admission in 1911, the proposed constitution contained a recall provision extending even to judicial officers. President Taft vetoed this constitution, and the judicial recall feature was accordingly stricken out and the territory duly admitted. Thereupon the Arizona constitution was promptly amended to include the original recall provisions, these being therefore among the most sweeping of those in any state. The suggestion has occasionally been made that members of Congress should again be subjected to the recall, and it has sometimes been urged that sweeping recall provisions like those in Arizona apply also to the members of Congress from the state concerned. Such application would, however, be of doubtful constitutionality, and as yet the recall applies only to officers within a state.

### a. The Recall in Arizona

[Constitution of Arizona, Art. VIII, 1, secs. 1-6; in Kettleborough, *State Constitutions*, pp. 69-70.]

#### 1. RECALL OF PUBLIC OFFICERS

SEC. 1. Every public officer in the State of Arizona, holding an elective office, either by election or appointment, is subject to recall from such office by the qualified electors of the electoral district from which candidates are elected to such office. Such electoral district may include the whole State. Such number of said electors as shall equal twenty-five per centum of the number of votes cast at the last preceding general election for all of the candidates for the office held by such officer, may by petition, which shall be known as a Recall Petition, demand his recall.

SEC. 2. Every Recall Petition must contain a general statement, in not more than two hundred words, of the grounds of such demand, and must be filed in the office in which petitions for nominations to the office held by the incumbent are required to be filed. The signatures to such Recall Petition need not all be on one sheet of paper, but each signer must add to his signature the date of his signing said petition, and his place of residence, giving his street and number, if any, should he reside in a town or city. One of the signers of each sheet of such petition, or the person circulating such sheet, must make and subscribe an oath on said sheet, that the signatures thereon are genuine.

SEC. 3. If said officer shall offer his resignation it shall be accepted, and the vacancy shall be filled as may be provided by law. If he shall



not resign within five days after a Recall Petition is filed, a special election shall be ordered to be held, not less than twenty, nor more than thirty days after such order, to determine whether such officer shall be recalled. On the ballots at said election shall be printed the reasons set forth in the petition for demanding his recall, and in not more than two hundred words, the officer's justification of his course in office. He shall continue to perform the duties of his office until the result of said election shall have been officially declared.

SEC. 4. Unless he otherwise request, in writing, his name shall be placed as a candidate on the official ballot without nomination. Other candidates for the office may be nominated to be voted for at said election. The candidate who shall receive the highest number of votes, shall be declared elected for the remainder of the term. Unless the incumbent receive the highest number of votes, he shall be deemed to be removed from office, upon qualification of his successor. In the event that his successor shall not qualify within five days after the result of said election shall have been declared, the said office shall be vacant, and may be filled as provided by law.

SEC. 5. No Recall Petition shall be circulated against any officer until he shall have held his office for a period of six months, except that it may be filed against a member of the Legislature at any time after five days from the beginning of the first session after his election. After one Recall Petition and election, no further Recall Petition shall be filed against the same officer during the term for which he was elected, unless petitioners signing such petition shall first pay into the public treasury which has paid such election expenses, all expenses of the preceding election.

SEC. 6. The general election laws shall apply to recall elections in so far as applicable. Laws necessary to facilitate the operation of the provisions of this article shall be enacted, including provisions for payment by the public treasury of the reasonable special election campaign expenses of such officer.

#### **b. Recall of Members of Congress**

[S. Doc. No. 108, 74 Cong., 1 Sess., printed in *Congressional Record*, vol. 79, pt. 10, pp. 10688-10689 (July 3, 1935).]

#### **CONSTITUTIONALITY OF THE RECALL OF UNITED STATES SENATORS AND REPRESENTATIVES IN CONGRESS**

For the reasons hereinafter specified, any attempt by a State to recall a United States Senator is repugnant to the Federal Constitution and is therefore void and of no effect.

There are three questions to be answered:

First. Can a State declare a vacancy to exist in the United States Senate prior to the expiration of the term of the incumbent?

Second. Can a State hold a special election to elect a United States Senator when no vacancy exists?

Third. Can a State set up qualifications for United States Senators in addition to the qualifications outlined in the Constitution?

The first and second questions can be answered jointly. Article I, section 4, clause 1, of the Federal Constitution provides that the times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the legislature thereof; but the Congress may at any time by law make or alter such regulations, except as to the places of choosing Senators. The times for holding regular elections for Senators and Representatives has been prescribed by Congress (title 2, U. S. C., secs. 1 and 7), and has the effect of superseding any State statutes inconsistent therewith. It therefore follows that the States are precluded from fixing a different time for the regular election of a Senator or Representative (*Ex parte Siebold* (Md. 1880) (100 U. S. 383)).

Article XVII of the Federal Constitution provides that when vacancies occur in the Senate the executive authority of the State may issue writs of election to fill such vacancies, and the legislature of the State may empower the executive to make a temporary appointment until such vacancy is filled by election.

The Governor of a State derives his authority to make an appointment to fill a vacancy in the United States Senate solely from the Federal Constitution and a law enacted by the legislature of his State pursuant to the Constitution. This power is conferred upon the Governor so that he may exercise his own best judgment as to whom he will select to fill such a vacancy until the people may express their choice at a subsequent election. No State can by law in any manner limit the choice which a governor may make in such an event. He is limited only by the Federal Constitution which requires that the person whom he appoints shall be at least 30 years of age, an American citizen for at least 9 years, and a resident of the State. Any such attempt further to limit the Governor's complete freedom of choice is vain and wholly without force.

Twelve States have laws which provide for the recall of State and local officials but it is unnecessary to comment thereon except to say, generally, that under this procedure the official against whom a recall petition may be properly filed is given an opportunity to resign. The usual requirement is that such petition must be signed by 25 per cent of the qualified electors. If he refuses to resign, a special election is held

to determine by majority vote whether the official shall be removed from office by the election of a rival candidate.

The application of this State recall system to the office of United States Senator would be an attempt by a State to fill a vacancy in the United States Senate before a vacancy exists therein and cannot be justified under either article I, section 4, of the Federal Constitution (relating to the time of holding regular elections) or under article XVII of such Constitution, which provides for a special election only when an actual vacancy exists.

No authority can be found under any other provision of the Federal Constitution for such special election. On the contrary, the result attempted to be achieved by such special recall election is in direct conflict with article I, section 5, clause 2 of such Constitution, which provides that each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two thirds expel a Member.

Under the guise of a recall election the State would attempt to expel a Member of the Senate and thereby usurp a power vested exclusively in the Senate by the Constitution. In *Burton v. U. S.* (202 U. S. 344, 2 p. 369) the Supreme Court, speaking through Mr. Justice Harlan, states that the seat into which a Senator is originally inducted can only become vacant by his death, by expiration of his term of office, or by some direct action on the part of the Senate in the exercise of its constitutional powers.

It therefore follows that if a vacancy does not exist, a State cannot create one, and a special election called to fill a nonexistent vacancy must necessarily be futile and without effect.

Answering the third question, in 1856 the Senate decided that a State might not add to the qualifications prescribed by the Constitution for a Senator. In the Lyman Trumbull case a provision of the Constitution of the State of Illinois provided that certain judges of that State should not be eligible to any other office of the State or of the United States during the term for which they were elected, nor for 1 year thereafter. Mr. Trumbull had been a judge and came within the prohibitions of the State constitution. Notwithstanding that fact, the Senate, after lengthy debate, by a vote of 35 yeas, 8 nays, declared Mr. Trumbull was entitled to his seat (*Hinds' Precedents*, vol. I, p. 387, sec. 416).

Article XVII of the Federal Constitution provides that the terms of Senators shall be for 6 years. If a State may recall a Senator elected for a term of 6 years, and before such term has expired, a further qualification has been added for Members of the Senate from that State.

The recall law would provide, in effect, that a Member of the Senate may hold office for 6 years, but only at the will of the people of the State. The State is not only attempting to set up an additional qualification for Senators but is also attempting to be the judge of such qualification in contravention to article I, section 5, clause 1, of the Federal Constitution, which provides that each House shall be the judge of the qualifications of its own Members.

Furthermore, the historical background of the 6-year term shows conclusively that Senators were to be chosen "to hold their office for a term sufficient to insure their independence." During the Constitutional Conventions held at Philadelphia and elsewhere prior to the ratification of the Constitution by the States, the terms of Senators were debated at great length. Terms ranging from 2 years to life were proposed. Madison reminded the delegates that the Senate was designed to protect the people against themselves as well as against their rulers—against their hasty and ill-advised decisions—a purpose more likely to be secured if its Members were given long terms and so gained experience. (See the Records of the Federal Convention, Farrand, vol. I, p. 228; Elliot's Debates on the Federal Constitution, vol. V, pp. 186-187, 241-245; and "the Madison Papers", vol. 2, p. 962.)

The recall law of any State is not in harmony with the reasons that led to the adoption of the 6-year term as such a law operates not to insure independence of thought and action but to restrict such thought and action by leaving Senators at the mercy of organized minorities and by leaving their tenure in office uncertain at all times.

If the independence of Members of the Senate is desired to be restricted, such restriction must necessarily take the form of an amendment to the Federal Constitution. No State can impose upon its Senators any restriction which is not applicable to Senators from all other States.

Any attempt to recall a Member of the House of Representatives must fail for the reasons above stated. A recall election is in effect nothing more or less than a petition by the ballots of a certain number of voters requesting the Senator or Representative against whom the recall is directed to resign his seat in Congress. There is no lawful way to compel such a resignation, which must be purely voluntary. If the Senator or Representative should resign nothing that has occurred prior to his resignation can be of any force or effect in bringing about the election of his successor in office.

A Senator or Representative has a right to resign his seat. When he does so the Federal law alone prescribes how the vacancy may be filled.

In the case of a Representative in Congress, the Governor has no power under the Federal Constitution to fill a vacancy by appointment. All that the Governor can do is to call a special election, or, by declining to do so, leave the congressional district without representation until after the next general election.

That a State may not superadd or vary the qualifications prescribed to the Senator or Representative by the Federal Constitution is clearly set forth in the following extract from Story on the Constitution (sec. 6. '):

"The truth is that the States can exercise no powers whatsoever which exclusively spring out of the existence of the National Government, which the Constitution does not delegate to them. They have just as much right, and no more, to prescribe new qualifications for a Representative as they have for a President. Each is an officer of the Union, deriving his powers and qualifications from the Constitution, and neither created by or dependent upon nor controllable by the States. It is no original prerogative of State power to appoint a Representative, a Senator, or President for the Union. Those officers owe their existence and functions to the united voice of the whole, not a portion of the people. Before a State can assert the right it must show that the Constitution has delegated and recognized it. No State can say that it has reserved what it never possessed."

In conclusion, a recall election held by any State in an attempt to remove from office a United States Senator, a Representative in Congress, or any Federal official serving within such State is void and of no effect. No State can impair the supremacy of the Federal Government by in any manner interrupting the tenure of office of any person serving under Federal authority.

WALTER F. GEORGE,  
*Chairman Committee on Privileges and Elections,*  
*United States Senate*

**PART III**  
**NATIONAL GOVERNMENT**





## CHAPTER VIII

### THE PRESIDENT: SELECTION AND TENURE

#### 43. THE TWO-TERM TRADITION

Among the most difficult questions before the Constitutional Convention of 1787 were those relating to tenure and the manner of selection of the President. Many members favored a single term of six or seven years (a proposal which has been renewed on numerous occasions since), but it was finally decided to give the President a relatively short term and to impose no limitation on his eligibility for re-election. This was felt by a considerable number to be one of the most dangerous features of the new Constitution, opening the way to a monarchy or even to a dictatorship, an opinion reflected by Jefferson when he wrote, "Experience concurs with reason in concluding that the first magistrate will always be re-elected if the Constitution permits it."<sup>1</sup> The examples of Washington and Jefferson in declining to serve more than two terms, however, established precedents that have as yet not been broken. Grant in 1880, and Roosevelt in 1912, are the only Presidents who have sought a third term, in each case without success. President Coolidge was supposed for some time to be desirous of a third term, but settled the question in the summer of 1927 by his laconic statement, "I do not choose to run for President in 1928." Whether the two-term tradition thus established has become a binding feature of our constitutional system, and particularly whether that tradition should apply to a Vice President who succeeds for only part of a term, are questions that have aroused much interest and discussion. Grant's ambition brought forth a House declaration against a third term, which was repeated by the Senate in identical language in February, 1928, when there was renewed talk of "drafting" President Coolidge.

##### a. Statement of Washington

[Farewell Address, Sept. 17, 1796. *Writings of George Washington* (Ford ed., published by G. P. Putnam's Sons), vol. XIII, pp. 277-281.]

FRIENDS, AND FELLOW-CITIZENS,

The period for a new election of a Citizen, to administer the Executive Government of the United States, being not far distant, and the time actually arrived, when your thoughts must be employed in designating the person, who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public voice, that I should now apprise you of the resolution I

<sup>1</sup> Letter to Madison, Dec. 20, 1787. *Writings of Thomas Jefferson* (Ford ed.), vol. IV, p. 477.

have formed, to decline being considered among the number of those, of whom a choice is to be made.

I beg you, at the same time, to do me the justice to be assured, that this resolution has not been taken, without a strict regard to all the considerations appertaining to the relation, which binds a dutiful citizen to his country—and that, in withdrawing the tender of service which silence in my situation might imply, I am influenced by no diminution of zeal for your future interest, no deficiency of grateful respect for your past kindness; but act under [and] am supported by a full conviction that the step is compatible with both.

The acceptance of, and continuance hitherto in, the office to which your suffrages have twice called me, have been a uniform sacrifice of inclination to the opinion of duty, and to a deference for what appears to be your desire.—I constantly hoped, that it would have been much earlier in my power, consistently with motives, which I was not at liberty to disregard, to return to that retirement, from which I had been reluctantly drawn.—The strength of my inclination to do this, previous to the last election, had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign Nations, and the unanimous advice of persons entitled to my confidence, impelled me to abandon the idea.—

I rejoice that the state of your concerns, external as well as internal no longer renders the pursuit of inclination incompatible with the sentiment of duty, or propriety; and am persuaded, whatever partiality may be retained for my services, that, in the present circumstances of our country, you will not disapprove of my determination to retire. . . .

#### b. Statement of Jefferson

[Letter to John Taylor. *Writings of Thomas Jefferson* (Ford ed., published by G. P. Putnam's Sons), vol. VIII, pp. 338–340.]

Washington, Jan. 6, 1805.

DEAR SIR,—Your favor of Dec. 26th has been duly received, and was received as a proof of your friendly partialities to me, of which I have so often had reason to be sensible. My opinion originally was that the President of the U. S. should have been elected for 7. years, & forever ineligible afterwards. I have since become sensible that 7. years is too long to be irremovable, and that there should be a peaceable way of withdrawing a man in mid-way who is doing wrong. The service for 8. years with a power to remove at the end of the first four, comes nearly to me

principle as corrected by experience. And it is in adherence to that that I determined to withdraw at the end of my second term. The danger is that the indulgence & attachments of the people will keep a man in the chair after he becomes a dotard, that reelection through life shall become habitual, & election for life follow that. Genl. Washington set the example of voluntary retirement after 8. years. I shall follow it, and a few more precedents will oppose the obstacle of habit to anyone after a while who shall endeavor to extend his term. Perhaps it may beget a disposition to establish it by an amendment of the constitution. I believe I am doing right, therefore, in pursuing my principle. I had determined to declare my intention, but I have consented to be silent on the opinion of friends, who think it best not to put a continuance out of my power in defiance of all circumstances. There is, however, but one circumstance which could engage my acquiescence in another election, to wit, such a division about a successor as might bring in a Monarchist. But this circumstance is impossible. While, therefore, I shall make no formal declarations to the public of my purpose,<sup>2</sup> I have freely let it be understood in private conversation. In this I am persuaded yourself & my friends generally will approve of my views: and should I at the end of a 2d term carry into retirement all the favor which the 1st has acquired, I shall feel the consolation of having done all the good in my power, and expect with more than composure the termination of a life no longer valuable to others or of importance to myself. Accept my affectionate salutations & assurances of great esteem & respect.

### c. Statement of Roosevelt

[White House statement, issued on election night, Nov. 8, 1904. Text in *N. Y. Times*, Feb. 20, 1927.]

I am deeply sensible of the honor done me by the American people in thus expressing their confidence in what I have done and have tried to do. I appreciate to the full the solemn responsibility this confidence imposes upon me, and I shall do all that in my power lies not to forfeit it. On the 4th of March next I shall have served three and one-half years, and this three and one-half years constitutes my first term. The wise custom which limits the President to two terms regards the substance and not the form. Under no circumstances will I be a candidate for or accept another nomination.

THEODORE ROOSEVELT.

<sup>2</sup> This declaration was repeated publicly and in similar language in a letter to the Vermont legislature, Dec. 10, 1807, reprinted in *N. Y. Times*, Feb. 20, 1927.

## d. Declaration of House of Representatives

[House Resolution of Dec. 15, 1875; offered by Wm. M. Springer (Ill.), and adopted by vote of 233-18, with apparently no debate. *Congressional Record*, vol. 4, p. 228.]

*Resolved*, That in the opinion of this House, the precedent established by Washington and other Presidents of the United States, in retiring from the presidential office after their second term, has become, by universal concurrence, a part of our republican system of government, and that any departure from this time-honored custom would be unwise, unpatriotic, and fraught with peril to our free institutions.<sup>3</sup>

## 44. PRESIDENTIAL SUCCESSION ACT OF 1886

Acting under its constitutional power to provide for the succession to the Presidency beyond the Vice President, Congress in 1792 passed an act vesting such succession, first, in the President pro tempore of the Senate, and next after him, in the Speaker of the House. During the summer of 1881, after President Garfield had been shot and was lingering at the point of death, it happened that Vice President Arthur became seriously ill and that there was neither a President of the Senate nor a Speaker of the House, the old Congress having expired and the new Congress not having yet been organized. The danger that the country might under this arrangement be left without a President led to the passage in 1886 of the second Succession Act, which is still in force.

[*U. S. Statutes*, vol. 24, pt. 1, pp. 1-2.]

CHAP. 4.—An act to provide for the performance of the duties of the office of President in case of the removal, death, resignation, or inability both of the President and Vice-President.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in case of removal, death, resignation, or inability of both the President and Vice-President of the United States, the Secretary of State, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Treasury, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of War, or if there be none, or in case of his removal, death, resignation, or inability, then the Attorney-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Postmaster-General, or if there be none, or in case of his removal, death, resignation, or inability, then the Secre-

<sup>3</sup> A similar resolution, introduced by Sen. LaFollette (Wis.), was adopted by the Senate on Feb. 10, 1928, by a vote of 56-26, after long and vigorous debate. *Congressional Record*, vol. 69, p. 2842.

tary of the Navy, or if there be none, or in case of his removal, death, resignation, or inability, then the Secretary of the Interior, shall act as President until the disability of the President or Vice-President is removed or a President shall be elected: *Provided*, That whenever the powers and duties of the office of President of the United States shall devolve upon any of the persons named herein, if Congress be not then in session, or if it would not meet in accordance with law within twenty days thereafter, it shall be the duty of the person upon whom said powers and duties shall devolve to issue a proclamation convening Congress in extraordinary session, giving twenty days' notice of the time of meeting.

SEC. 2. That the preceding section shall only be held to describe and apply to such officers as shall have been appointed by the advice and consent of the Senate to the offices therein named, and such as are eligible to the office of President under the Constitution, and not under impeachment by the House of Representatives of the United States at the time the powers and duties of the office shall devolve upon them respectively.

SEC. 3. That sections one hundred and forty-six, one hundred and forty-seven, one hundred and forty-eight, one hundred and forty-nine, and one hundred and fifty of the Revised Statutes are hereby repealed.

Approved, January 19, 1886.

## 45. PRESIDENTIAL INABILITY

The Constitution provides that the Vice President shall succeed to the Presidency in case of the President's removal, death, resignation, or inability to act. What constitutes "inability" is not in itself clear, nor is it further defined in the Constitution. Furthermore, no officer or organ of government is given power to determine when the President is disabled to such an extent as to require the succession of the Vice President. The question became especially acute during the illnesses of President Garfield in 1881 and of President Wilson in 1919. In both cases the President was for a considerable period completely unable to function, and the Vice President declined to act, feeling himself without proper authority. The serious illness of President Wilson brought about a renewal of discussion on the question, an investigation by a Senate committee into the President's competence, and several proposals to remedy the situation, none of which were adopted.

### a. Inability of President Wilson

[From *The True Story of Woodrow Wilson* by David Lawrence (George H. Doran Company, copyright 1924), pp. 283-285, 288.]

No period in American history parallels that in which the Government of the United States had no President for, immediately following



Woodrow Wilson's physical breakdown, he was unable to function as the Chief Executive.

Opinions may differ as to whether any important piece of public business was neglected—the Cabinet took care of every decision and executed every policy. But there can be no doubt that, for a few days at least, after his return from the Western trip, the President was disabled. For a long time thereafter he was unable to discharge the duties of his office to the extent that he had in the preceding years of his term.

Serious moments there were when it was thought Mr. Wilson would not live. As the crisis was passed and it became apparent that the President would be unable to see many callers or write extended communications on matters of state, his supporters developed the fear that in the Senate or elsewhere there might be raised the question of succession, under the Constitution, which provides that the Vice President shall succeed the President in case of inability.

The Constitution itself is not very clear on the question of what shall be done when a President is disabled. It says:

“In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice President, and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.”

Is the Vice President to become President or merely assume the duties and discharge the powers of the Presidential office until the President's disability is removed? No Vice President has ever assumed office on the disability of a President, and Mr. Thomas R. Marshall, who was Vice President during President Wilson's incapacity, made no effort to succeed him. Congress has never passed a law specifically giving the procedure that should be followed in case of Presidential inability.

After the President suffered a stroke his condition was so alarming that he was unable for several days to sign documents or attend to public business. The Secretary of State, Robert Lansing, called at the Executive Offices to learn the true condition of the President because the King and Queen of the Belgians, who were in New York, had expressed a desire to come to Washington if they would be received. Rear Admiral Cary T. Grayson, the President's physician, told Mr. Lansing that Mr. Wilson was in no condition to receive the King and Queen, much as he would like to do so, and that, perhaps, if their itinerary were rearranged the visit might be accomplished later on. Mr. Lansing was unable to ob-

tain any definite information as to the true nature of the President's illness.

The next day he asked Secretary Tumulty whether the President was able to sign documents and carry on his duties. Mr. Lansing relates that he expressed to both Admiral Grayson and Mr. Tumulty the fear that a demand might be made in Congress to have the Vice President take office under the disability article of the Constitution. Secretary Tumulty voiced indignation that anyone in Congress would consider such a thing, while Dr. Grayson pointed out that he would not certify as a physician that the President was incapacitated for duty. Both Admiral Grayson and Secretary Tumulty, however, are credited by Mr. Lansing with having agreed with his plan of calling Cabinet meetings. The first notices to Cabinet members were sent through the telephone switchboard in the White House. Admiral Grayson attended the first meeting and reported on the improvement in Mr. Wilson's condition. There was no discussion about the Vice President succeeding Mr. Wilson either at the first or any of the Cabinet meetings which followed.

. . . . .  
There is no doubt Mr. Wilson's condition became much better after the first few weeks of his illness and that, by the month of February, when he called for the resignation of Secretary Lansing, he had recovered sufficiently to do at least one or two hours of work each day.

The President's shaky signature to public documents and the gradual improvement thereafter in his handwriting tell a story of how difficult it was for the President to carry on in his hours of physical distress. Only the most important matters were placed before him in the limited time that his physicians said he could afford to give to public business.

Unfavorable news was withheld from Mr. Wilson and nothing was done that was in the least calculated to excite or disturb. The President was given to emotional outbursts, wept very often, and grew melancholy over his breakdown.

Throughout this period Mrs. Wilson was constantly at his bedside as was also his eldest daughter, Miss Margaret. The devotion of the wife and daughter was no small factor in nursing the President back to more and more participation in public affairs. Mrs. Wilson stood between her husband and the Government, indeed between him and the outside world. It was she who acted as personal secretary, taking notes and writing memoranda and messages to the various Cabinet officers and officials of the Government generally. Even the Private Secretary, Mr. Tumulty, refrained from entering the bedchamber except when sent for. He placed his memoranda on vital questions before Mrs. Wilson, leav-

ing it to her to discover the proper moment to ask the President for his opinion or decision. She was, so to speak, the reigning monarch.<sup>4</sup>

### b. Report of Senate Committee, 1920

[Letter from ex-Senator Gilbert M. Hitchcock to Clarence A. Berdahl; reprinted by permission.]<sup>5</sup>

Omaha, Nebraska,  
November 7, 1927.

Dear Sir:

. . . As I recall the facts, the selection of the sub-committee was entirely informal, and the occurrence was about as follows—

Senator Fall had several times declared in a meeting of the Foreign Relations Committee that in his opinion President Wilson was unable to function as President of the United States, that Mrs. Wilson was practically acting in that capacity, and that an inquiry should be made.

One day, after Fall had made such a statement in rather an offensive way, I suggested that the President probably would not object if Mr. Fall himself would make an investigation. He at once said he thought the Committee should appoint someone, and that if it would appoint him he would be glad to go. Some member of the Committee suggested that it would hardly do to send a single member of the Committee, and that if Mr. Fall went I should be named with him to represent the minority of the Committee. Thereupon quite informally that was agreed to, a motion was made, and the chairman was instructed to inquire of the White House whether a visit from such a committee would be welcome, and, if so, at what time. Senator Lodge acted on the authority, and at once secured a telephoned reply from the White House that we could come up that afternoon.

We went up, and were escorted into the President's bedroom, where he lay propped up in bed. To the evident surprise of Senator Fall, the President held out his hand and shook hands with Fall vigorously, and motioned him to a seat by the bedside. Thereupon a lively conversation ensued, chiefly on the subject of Mexican relations, pointed several times with witticisms and stories on the part of the President. I had been at the bedside on numerous occasions during the President's illness, and therefore took no part in the conversation. Senator Fall hardly got over his surprise to find the President so active and alert mentally, and in the

<sup>4</sup> Cf. Mrs. Wilson's account, in her book *My Memoir* (Indianapolis, Bobbs-Merrill Co., 1938), pp. 288-290.

<sup>5</sup> Mrs. Wilson's account of this incident also tends to support the statement of Senator Hitchcock. *Ibid.*, pp. 298-299.

course of fifteen or twenty minutes I suggested that we bring our visit to an end.

No written report of that little call was ever made to the Committee, but Senator Fall confessed himself completely satisfied, and made no further claim that the President was incompetent. He made this confession first to the crowd of newspaper men awaiting our exit from the White House, and in the next meeting of the Committee on Foreign Relations the matter was laughed off and dropped.

Fall, like many others, had previously been completely convinced that the President was so paralyzed that he could not sign his documents, and the President's vigorous handshake was the first shock of the disillusion. As a matter of fact, it was not known that it was the left arm which was paralyzed and concealed by the covers; and as a matter of fact also, I realized that the President braced himself for this interview with Fall, aided by his strong will power.

I am frank to say that one of our serious lacks in the United States is the total absence of any legislation to carry into effect the constitutional provision that in case of the disability of the President the Vice-President shall act. There should be enacted some legislation by Congress providing a summary proceeding to investigate the question of disability whenever it shall arise in the future, and in this investigation it seems to me both Houses of Congress and the Supreme Court should have a part.

It is quite conceivable that in the future there may arise this situation of doubt and uncertainty, without any method at hand dispassionately to determine whether, as a matter of fact, presidential disability exists.

Yours truly,

(Signed) G. M. HITCHCOCK.

### **c. View of Vice President Marshall**

[Statement, Nov. 26, 1918, in view of President Wilson's proposed attendance upon the Peace Conference in Paris. *N. Y. Times*, Nov. 27, 1918.]

One—With regard to the suggestion that I might voluntarily assume the Presidency and raise a legal question as to my right of tenure by some such act as the signing of a legislative bill: I can state now definitely and positively that I shall not of my own volition assume President Wilson's office or the duties thereof if the President departs from the United States to attend the Peace Conference.

Two—As for the suggestion that a joint resolution of Congress might be adopted to "set the Vice President in motion": This proposal is entirely new to me, and I am unable to commit myself as to what I would do if the Congress should adopt jointly such a resolution.

Three—In answer to the suggestion that a court having jurisdiction might mandamus me to assume the duties of the President: I unquestionably would assume the Presidency of the United States and exercise the duties of that office if a court having jurisdiction directed me to do so.

My relations with President Wilson have been extremely warm and friendly and cordial, and they are so today. For that reason I cannot emphasize too strongly that I do not wish to say anything that might convey the impression that I think he should not go to the Peace Conference if he sees fit to go. Furthermore, I do not want to say one word that might give the impression that I was participating in any discussion of constitutionality, or precedent, or propriety, which is designed to make him hesitate or to induce him to abandon his journey.

I have assumed from the first that there was no barrier to Mr. Wilson's leaving the country to attend the Peace Conference if he decided that it was his duty to go abroad for that purpose. The only discussion as to the constitutionality of such an act that I have heard was a brief one to which I listened recently, and which concerned itself solely with the President's right to go, and not with any question as to what would happen at home if he did go.

I emphasize that because I am particularly anxious that the public should understand that I have taken no position in opposition to the President's going, and I most certainly want him to know beyond a doubt that, so far as I have formed any opinion, that opinion has been that he certainly could go if he wanted to. . . .

Of course, I am aware of [the] constitutional provision, but I repeat I have not considered it in connection with Mr. Wilson's forthcoming trip. I never dreamed of any trouble arising. I can say to you that not voluntarily shall I assume the office of President of the United States. If I should become President during Mr. Wilson's absence, unquestionably that would have to occur through some judicial or legislative process. The idea of its occurring through legislative process is new to me, so I cannot attempt to say now what I would do if the two houses of Congress in joint resolution should call upon me to act. That is a responsibility that would have to be met when it arose and if it arose. The possibility of judicial action is a different one. If that should be taken and a court possessed of jurisdiction should order me to assume the Presidency, I certainly would obey that court, and I would assume and discharge the duties of the Presidency.

I have made no investigation of this subject. I saw no reason to. The President decided it was right and proper for him to go to the Peace Conference, and I supported his decision heartily and cordially.



Most certainly I do not want his job while he is away. That does not mean that I am dodging responsibility. I am not. If the question should arise, I would meet it squarely and accept whatever responsibility was placed upon me. I am most reluctant to become involved in any academic discussion of the constitutional or other questions involved, because I am fearful that my participation in such a discussion might give the President the impression that I am in some way opposing his going. I am not. Furthermore, as I said, I have not studied these questions for the reason that I did not anticipate anything arising which would force them upon me.

#### 46. PRESIDENTIAL BALLOT

The Constitution provides that Presidential Electors are to be chosen as the legislature of each state may determine, but that the time of their election and meeting is to be determined by Congress. Accordingly Congress has fixed a uniform day for the selection of these Electors and provided the details of their meeting and balloting for President, as illustrated below. The method of selection, however, varied at first, the Electors being chosen in some states by popular election, in others by the legislature itself. The method of popular election became uniform in all the states by 1864, and later the Electors were also uniformly chosen at large, instead of by districts. In view of the fact that these Electors no longer express their own choice for President, but merely register the choice of their party, the most recent tendency is to eliminate their names from the ballot altogether, and provide some other method for their selection and at the same time for registering the voter's choice for President. Beginning with Nebraska in 1917, more than a dozen states have provided laws of this character, differing from one another in detail, but agreeing on the general principle.

##### a. Act of Congress with respect to Presidential Electors

[*U. S. Statutes*, vol. 24, pt. 2, pp. 373-375.]

CHAP. 90.—An act to fix the day for the meeting of the electors of President and Vice President, and to provide for and regulate the counting of the votes for President and Vice President, and the decision of questions arising thereon.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the electors of each State shall meet and give their votes on the second Monday in January<sup>6</sup> next following their appointment, at such place in each State as the legislature of such State shall direct.

<sup>6</sup> Changed by Act of May 29, 1928, to the first Wednesday in January (*U. S. Statutes*, vol. 45, p. 945); and by Act of June 5, 1934, following the adoption of the 20th [Lame Duck] Amendment, to the first Monday after the second Wednesday in December (*U. S. Statutes*, vol. 48, p. 879).



SEC. 2. That if any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to the said time of meeting of the electors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

SEC. 3. That it shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of electors in such State, by the final ascertainment under and in pursuance of the laws of such State providing for such ascertainment, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such ascertainment of the electors appointed, setting forth the names of such electors and the canvass or other ascertainment under the laws of such State of the number of votes given or cast for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to deliver to the electors of such State, on or before the day on which they are required by the preceding section to meet, the same certificate, in triplicate, under the seal of the State; and such certificate shall be inclosed and transmitted by the electors at the same time and in the same manner as is provided by law for transmitting by such electors to the seat of Government the lists of all persons voted for as President and of all persons voted for as Vice President; and section one hundred and thirty-six of the Revised Statutes is hereby repealed; and if there shall have been any final determination in a State of a controversy or contest as provided for in section two of this act, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate, under the seal of the State, to the Secretary of State of the United States, a certificate of such determination, in form and manner as the same shall have been made; and the Secretary of State of the United States, as soon as practicable after the receipt at the State Department of each of the certificates hereinbefore directed to be transmitted to the Secretary of State, shall publish, in such public newspaper as he shall designate, such certificates in full; and at the first meeting of Congress thereafter he shall transmit to the two Houses of Congress

copies in full of each and every such certificate so received theretofore at the State Department.

SEC. 4. That Congress shall be in session on the second Wednesday in February <sup>7</sup> succeeding every meeting of the electors. The Senate and House of Representatives shall meet in the Hall of the House of Representatives at the hour of one o'clock in the afternoon on that day, and the President of the Senate shall be their presiding officer. Two tellers shall be previously appointed on the part of the Senate and two on the part of the House of Representatives, to whom shall be handed, as they are opened by the President of the Senate, all the certificates and papers purporting to be certificates of the electoral votes, which certificates and papers shall be opened, presented, and acted upon in the alphabetical order of the States, beginning with the letter A; and said tellers, having then read the same in the presence and hearing of the two Houses, shall make a list of the votes as they shall appear from the said certificates; and the votes having been ascertained and counted in the manner and according to the rules in this act provided, the result of the same shall be delivered to the President of the Senate, who shall thereupon announce the state of the vote, which announcement shall be deemed as sufficient declaration of the persons, if any, elected President and Vice President of the United States, and, together with a list of the votes, be entered on the Journals of the two Houses. Upon such reading of any such certificate or paper, the President of the Senate shall call for objections, if any. Every objection shall be made in writing, and shall state clearly and concisely, and without argument, the ground thereof, and shall be signed by at least one Senator and one Member of the House of Representatives before the same shall be received. When all objections so made to any vote or paper from a State shall have been received and read, the Senate shall thereupon withdraw, and such objections shall be submitted to the Senate for its decision; and the Speaker of the House of Representatives shall, in like manner, submit such objections to the House of Representatives for its decision; and no electoral vote or votes from any State which shall have been regularly given by electors whose appointment has been lawfully certified to according to section three of this act from which but one return has been received shall be rejected, but the two Houses concurrently may reject the vote or votes when they agree that such vote or votes have not been so regularly given by electors whose appointment has been so certified. If more than one return or paper purporting to be a return from a State shall have been received by the President of the Senate, those votes, and those only, shall be counted

<sup>7</sup> Changed in 1934 to January 6.

which shall have been regularly given by the electors who are shown by the determination mentioned in section two of this act to have been appointed, if the determination in said section provided for shall have been made, or by such successors or substitutes, in case of a vacancy in the board of electors so ascertained, as have been appointed to fill such vacancy in the mode provided by the laws of the State; but in case there shall arise the question which of two or more of such State authorities determining what electors have been appointed, as mentioned in section two of this act, is the lawful tribunal of such State, the votes regularly given of those electors, and those only, of such State shall be counted whose title as electors the two Houses, acting separately, shall concurrently decide is supported by the decision of such State so authorized by its laws; and in such case of more than one return or paper purporting to be a return from a State, if there shall have been no such determination of the question in the State aforesaid, then those votes, and those only, shall be counted which the two Houses shall concurrently decide were cast by lawful electors appointed in accordance with the laws of the State, unless the two Houses, acting separately, shall concurrently decide such votes not to be the lawful votes of the legally appointed electors of such State. But if the two Houses shall disagree in respect of the counting of such votes, then, and in that case, the votes of the electors whose appointment shall have been certified by the Executive of the State, under the seal thereof, shall be counted. When the two Houses have voted, they shall immediately again meet, and the presiding officer shall then announce the decision of the questions submitted. No votes or papers from any other State shall be acted upon until the objections previously made to the votes or papers from any State shall have been finally disposed of.

SEC. 5. That while the two Houses shall be in meeting as provided in this act the President of the Senate shall have power to preserve order; and no debate shall be allowed and no question shall be put by the presiding officer except to either House on a motion to withdraw.

SEC. 6. That when the two Houses separate to decide upon an objection that may have been made to the counting of any electoral vote or votes from any State, or other question arising in the matter, each Senator and Representative may speak to such objection or question five minutes, and not more than once; but after such debate shall have lasted two hours it shall be the duty of the presiding officer of each House to put the main question without further debate.

SEC. 7. That at such joint meeting of the two Houses seats shall be provided as follows: For the President of the Senate, the Speaker's

chair; for the Speaker, immediately upon his left; the Senators, in the body of the Hall upon the right of the presiding officer; for the Representatives, in the body of the Hall not provided for the Senators; for the tellers, Secretary of the Senate, and Clerk of the House of Representatives, at the Clerk's desk; for the other officers of the two Houses, in front of the Clerk's desk and upon each side of the Speaker's platform. Such joint meeting shall not be dissolved until the count of electoral votes shall be completed and the result declared; and no recess shall be taken unless a question shall have arisen in regard to counting any such votes, or otherwise under this act, in which case it shall be competent for either House, acting separately, in the manner hereinbefore provided, to direct a recess of such House not beyond the next calendar day, Sunday excepted, at the hour of ten o'clock in the forenoon. But if the counting of the electoral votes and the declaration of the result shall not have been completed before the fifth calendar day next after such first meeting of the two Houses, no further or other recess shall be taken by either House.

Approved, February 3, 1887.

#### **b. Illinois Law with respect to Presidential Electors**

[*Laws of Illinois, 1927, pp. 450-453.*]

*Be it enacted by the People of the State of Illinois, represented in the General Assembly:*

SECTION 1. Sections 1, 2, 3, 4, and 5 of "An Act in regard to elections, and to provide for filling vacancies in elective offices," approved April 3, 1872, as amended, are amended to read as follows:

§ 1. That there shall be elected by general ticket in the manner and with the effect hereinafter provided, on the Tuesday next after the first Monday in November preceding the expiration of the term of office of each President of the United States, as many electors of President and Vice President of the United States as this State may be entitled to elect; which election shall be conducted and returns thereof made as herein-after provided: *Provided*, that if Congress should hereafter fix a different day for such election, then the election for electors shall be held on such day as shall be named by Act of Congress. The choosing, and election of electors aforesaid shall be made in the following manner:

(a) In each year in which a President and Vice President of the United States are chosen, each political party or group in this State shall choose by its State convention electors of President and Vice President

of the United States and such State convention of such party or group shall also choose electors at large, if any are to be appointed for this State and such State convention of such party or group shall by its chairman and secretary certify the total list of such electors together with electors at large so chosen to the Secretary of State of Illinois.

The filing of such certificate with said Secretary of State, of such choosing of electors shall be deemed and taken to be the choosing and selection of the electors of this State, if such party or group is successful at the polls as herein provided in choosing their candidates for President and Vice President of the United States.

(b) The names of the candidates of the several political parties or groups for electors of President and Vice President shall not be printed on the official ballot to be voted in the election to be held on the day in this section first above named. In lieu of the names of the candidate for such electors of President and Vice President, immediately under the appellation of party name of a party or group in the column of its candidates on the official ballot, to be voted at said election first above named in this section, there shall be printed within a bracket the name of the candidate for President and the name of the candidate for Vice President of such party or group with a square to the left of such bracket. Each voter in this State from the several lists or sets of electors so chosen and selected by the said respective political parties or groups, may choose and elect one of such lists or sets of electors by placing a cross in the square to the left of the bracket aforesaid of one of such parties or groups.

Placing a cross within the square before the bracket enclosing the names of President and Vice President shall not be deemed and taken as a direct vote for such candidates for President and Vice President, or either of them, but shall only be deemed and taken to be a vote for the entire list or set of electors chosen by that political party or group so certified to the Secretary of State as herein provided.

(c) Such certification by the respective political parties or groups in this State of electors of President and Vice President shall be made to the Secretary of State within two days after such State convention.

(d) Should more than one certificate of choice and selection of electors of the same political party or group be filed by contesting conventions or contesting groups, it shall be the duty of the Governor, the Secretary of State, the Auditor of Public Accounts, the State Treasurer and the Attorney General within ten days after the adjournment of the last of such conventions to meet in the office of the Governor and determine which set of nominees for electors of such party or group was



chosen and selected by the authorized convention of such party or group. The Secretary of State shall notify such State officers of the date, time and place of such meeting. At such meeting a majority of the said officers present, after notice to the chairman and secretaries or managers of the conventions or groups and after a hearing, shall determine which set of electors was so chosen by the authorized convention and shall so announce and publish the fact, and such decision shall be final and the set of electors so determined upon by said State officers to be so chosen shall be the list or set of electors to be deemed elected if that party shall be successful at the polls, as herein provided.

(e) Should a vacancy occur in the choice of an elector in a congressional district, such vacancy may be filled by the executive committee of the party or group for such congressional district, to be certified by such committee to the Secretary of State of Illinois. Should a vacancy occur in the office of elector at large, such vacancy shall be filled by the State committee of such political party or group, and certified by it to the Secretary of State of Illinois.

§ 2. The county clerks of the several counties shall, within eight days next after holding the election first named in section 1 of this Act, make three copies of the abstract of the votes cast for electors by each political party or group, as indicated by the voter, as aforesaid, by a cross in the square to the left of the bracket aforesaid, or as indicated by a cross in the appropriate place preceding the appellation or title of the particular political party or group, and transmit by mail one of said copies to the Governor, another to the office of the Secretary of State, and retain the third in his office, to be sent for by the Governor in case both the others should be mislaid. Within twenty days after the holding of such election, and sooner if all the returns are received by either the Governor or by the Secretary of State, the Secretary of State, Auditor of Public Accounts and Treasurer, or any two of them, shall, in the presence of the Governor, proceed to open and canvass said election returns and to declare which set of candidates for President and Vice President received, as aforesaid, the highest number of votes cast at such election as aforesaid; and the electors of that party whose candidates for President and Vice President received the highest number of votes so cast shall be taken and deemed to be elected as electors of President and Vice President but should two or more sets of candidates for President and Vice President be returned with an equal and the highest vote, the said Secretary of State shall cause a notice of the same to be published, which notice shall name some day and place, not less than five days from the time of such publication of such notice, upon which the Governor,



Attorney General, Secretary of State, Auditor of Public Accounts and State Treasurer will decide by lot which of said sets of candidates for President and Vice President so equal and highest shall be declared to be highest. And upon the day and at the place so appointed in said notice, the said Secretary, Auditor, Treasurer, Attorney General and Governor shall so decide by lot and declare which is deemed highest of the said sets of candidates for President and Vice President so equal and highest, thereby determining only that the electors chosen as aforesaid by such candidates' party or group are thereby elected by general ticket to be such electors.

§ 3. Within five days after the votes shall have been canvassed and the results declared or the result declared by lot as provided for in section 2 above, the Governor shall cause the result of said election to be published, and shall proclaim the persons electors of President and Vice President so chosen composing the list so elected, by transmitting by mail to the several persons so chosen and composing the list or set electors of President and Vice President certificates in triplicate, under the Seal of State of their appointment, and shall also transmit under the Seal of State to the Secretary of State of the United States the certificate of the election of said electors as required by the laws of Congress.

§ 4. The electors, elected as aforesaid, shall meet at the office of the Secretary of State in a room to be designated by him in the Capitol at Springfield in this State, at the time appointed by the laws of the United States at the hour of ten o'clock in the forenoon of such day and give their votes for President and for Vice President of the United States, in the manner herein provided, and perform such duties as are or may be required by law. Each elector shall receive for every twenty miles necessary travel in going to the seat of government to give his vote and returning to his residence, to be computed by the most usual route, the sum of three dollars (\$3.00), to be paid on the warrant of the Auditor out of any money in the treasury not otherwise appropriated, and any person appointed by the electors assembled to fill a vacancy shall also receive the compensation provided for electors appointed.

§ 5. In case any person duly elected an elector of President and Vice President of the United States shall fail to attend at the Capitol on the day on which his vote is required to be given, it shall be the duty of the elector or electors of President and Vice President, attending at the time and place, to appoint a person to fill such vacancy; *provided*, that should the person or persons chosen, as in this Act provided, in the foregoing sections, arrive at the place aforesaid before the votes for President are

Vice President are actually given, the person or persons appointed to fill such vacancy shall not act as elector of President and Vice President.  
Approved July 11, 1927.

## 47. MINORITY PRESIDENTS

The electoral system established by the Constitution by no means ensures majority control in the selection of the President. With the introduction of the political party and the adoption by the states of election at large, the entire list of Electors nominated by the successful party in any state is almost certain of election. Hence it is easily possible for a candidate to carry the states having large blocks of Electors and thus secure a majority in the Electoral College, without at the same time winning a majority of the total popular vote. That this has actually happened on numerous occasions is indicated by the following table:

### MINORITY PRESIDENTS

YEAR	NAME	POPULAR VOTE	PER CENT	ELECTORAL VOTE	PER CENT
1824*	Jackson (Republican).....	152,901	42	99	38
	Adams (Republican).....	114,023	32	84	32
	Crawford (Republican).....	46,979	13	41	16
	Clay (Republican).....	47,217	13	37	14
1844†	Polk (Democrat).....	1,337,243	49	170	62
	Clay (Whig).....	1,299,062	48	105	38
	Birney (Liberty).....	62,300	3	0	0
1848†	Taylor (Whig).....	1,360,099	47	163	56
	Cass (Democrat).....	1,220,544	42	127	44
	Van Buren (Free Soil).....	291,263	11	0	0
1856†	Buchanan (Democrat).....	1,838,169	45	174	59
	Fremont (Republican).....	1,341,264	33	114	38
	Fillmore (American).....	874,534	22	8	3
1860†	Lincoln (Republican).....	1,866,452	40	180	60
	Douglas (Democrat).....	1,376,957	29	12	4
	Breckinridge (Democrat).....	849,781	18	72	24
	Bell (Constitutional Union).....	588,879	13	39	12
1876†	Hayes (Republican).....	4,033,768	48	185	50.2
	Tilden (Democrat).....	4,285,992	51	184	49.8
	Cooper (Greenback).....	81,737	.9	0	0
	Smith (Prohibition).....	9,522	.1	0	0

\* Incomplete figures, 6 states having legislative election of Electors (Del., Ga., La., N. Y., S. C., Vt.). Adams was elected by the House.

† Incomplete, South Carolina having legislative election.

‡ The accuracy of the popular vote for Hayes and Tilden was disputed. Since Hayes was declared elected, the Republican figures are accepted, the Democratic figures not being substantially different.

YEAR	NAME	POPULAR VOTE	PER CENT	ELECTORAL VOTE	P C T
1880	Garfield (Republican).....	4,454,416	48.3	214	5
	Hancock (Democrat).....	4,444,952	48.2	155	4
	Weaver (Greenback).....	308,578	3.4	0	
	Dow (Prohibition).....	10,305	.1	0	
1884	Cleveland (Democrat).....	4,874,986	48.5	219	5
	Blaine (Republican).....	4,851,981	48.2	182	4
	Butler (Greenback).....	175,370	.2	0	
	St. John (Prohibition).....	150,369	.1	0	
1888	Harrison (Republican).....	5,439,853	48	233	5
	Cleveland (Democrat).....	5,540,329	49	168	4
	Fisk (Prohibition).....	249,506	2	0	
	Streeter (Union Labor).....	146,935	1	0	
1892	Cleveland (Democrat).....	5,556,543	46	277	6
	Harrison (Republican).....	5,175,582	43	145	3
	Weaver (Populist).....	1,040,886	8.6	22	
	Bidwell (Prohibition).....	255,841	2	0	
	Wing (Socialist Labor).....	21,532	.4	0	
1912	Wilson (Democrat).....	6,293,019	42	435	8
	Roosevelt (Progressive).....	4,119,507	27.2	88	1
	Taft (Republican).....	3,484,956	23.2	8	
	Chafin (Prohibition).....	207,828	1.4	0	
	Debs (Socialist).....	901,873	6	0	
	Reimer (Socialist Labor).....	29,259	.2	0	
1916	Wilson (Democrat).....	9,129,269	49	277	5
	Hughes (Republican).....	8,547,328	46	254	4
	Benson (Socialist).....	590,579	3.2	0	
	Hanly (Prohibition).....	221,329	1.2	0	
	Reimer (Socialist Labor).....	14,180	.1	0	

#### 48. CALL FOR THE NATIONAL CONVENTION

The Constitution makes no provision for the nomination of presidential candidates, nor is there yet (1940) any law of Congress dealing with that subject. Beginning in 1796, the party members in Congress assumed the function of recommending candidates for their respective parties, but by 1824 this Congressional Caucus, as it was called, had fallen into disrepute and was abandoned. The system of delegate conventions had already been used to some extent in the states; it was used by the Anti-Masonic party in 1831 for the nomination of its presidential candidates, was soon adopted similarly by all parties, and has since become a fixed part of our political machinery. The methods of composing such national nominating conventions are indicated by the following documents.

**a. Call for Republican Convention, 1936**

[*Official Proceedings, Republican National Convention, 1936*, pp. 11-16.]

*To the Republican Voters of the United States:*

In compliance with the rules adopted by the Republican National Convention of 1932, the Republican National Committee directs that a National Convention of delegated representatives of the Republican Party be held at Cleveland, Ohio, at eleven o'clock A.M. on June 9, 1936, for the purpose of nominating candidates for President and Vice-President, to be voted for at the Presidential Election on Tuesday, November 3, 1936, and for the transaction of such other business as may properly come before it.

The voters of the several States and of Alaska, Hawaii and Puerto Rico and the residents of the District of Columbia who are in accord with the principles of the Republican Party, believe in its declaration of policies, and are in sympathy with its aims and purposes, are invited to unite under this Call in the selection of Delegates to said Convention.

Said National Convention shall consist of

**(a) DELEGATES AT LARGE**

1. Four Delegates-at-Large from each State.
2. Two additional Delegates-at-Large for each Representative-at-Large in Congress from each State.
3. Three Delegates-at-Large each for Alaska, District of Columbia and Hawaii and two Delegates-at-Large for Puerto Rico.
4. Three additional Delegates-at-Large from each State casting its electoral vote, or a majority thereof, for the Republican nominee for President in the last preceding Presidential election.

**(b) DISTRICT DELEGATES**

1. One District Delegate from each Congressional District.
2. One additional District Delegate from each Congressional District casting 10,000 votes or more for any Republican elector in the last preceding Presidential election or for the Republican nominee for Congress in the last preceding Congressional election.

**(c) ALTERNATE DELEGATES**

One Alternate Delegate to each Delegate to the National Convention.

## DELEGATES SHALL BE ELECTED UNDER THE FOLLOWING RULES:

(a) Only legal and qualified voters shall participate in a Republican primary, caucus, mass meeting or mass convention, held for the purpose of selecting delegates to a County, District or State Convention, and only such legal and qualified voters shall be elected as delegates to County, District and State Conventions.

(b) District Conventions shall be composed of Delegates who are legal and qualified voters therein, and Delegates to State Conventions shall also be qualified voters of the respective districts which they represent in said State Conventions. Such Delegates shall be apportioned among the counties, parishes and cities of the State or District having regard to the Republican vote therein.

(c) Delegates and Alternates to the National Convention shall be duly qualified voters of their respective States, Territories and Territorial possessions, and in the case of the District of Columbia shall be residents therein.

(d) Delegates-at-Large and their Alternates and Delegates from Congressional Districts and their Alternates to the National Convention shall be elected in the following manner:

(1) By primary election, in accordance with the laws of the State in which the election occurs, in such States as require by law the election of Delegates to National Conventions of political parties by direct primary; provided, that in any State in which Republican representation upon the Board of judges or inspectors of elections for such primary election is denied by law, Delegates and Alternates shall be elected as hereinafter provided.

(2) By District or State Conventions, as the case may be, to be called by the District or State Committees respectively. Notice of the call for any such convention shall be published in a newspaper or newspapers of general circulation in the District or State, as the case may be, not less than fifteen days prior to the date of said convention. In a Congressional District where there is no Republican District Committee, the Republican State Committee shall issue the call and make said publication.

(3) By the Republican State Committee or governing committee in any State in which the law of such State specifically authorizes the election of Delegates in such manner.

(4) All Delegates from any State may, however, be chosen from the State at Large, in the event that the laws of the State in which the election occurs so provide.

(e) Provided, however, that in selecting Delegates and Alternates to the National Convention, no State law shall be observed which hinders, abridges or denies to any citizen of the United States, eligible under the Constitution of the United States, to the office of President or Vice-President, the right or privilege of being a candidate under such State law for the nomination for President or Vice-President; or which authorizes the election of a number of Delegates or Alternates from any State to the National Convention different from that fixed in this Call.

(f) Alternate Delegates shall be elected to said National Convention for each unit of representation equal in number to the number of Delegates elected therein and shall be chosen in the same manner and at the same time the Delegates are chosen; provided, however, that if the law of any State shall prescribe the method of choosing Alternates they shall be chosen in accordance with the provisions of the law of the State in which the election occurs.

(g) The election of Delegates and Alternates from Alaska, Hawaii, Puerto Rico and the District of Columbia shall be held under the direction of and in such manner and under such rule as may be adopted by the respective recognized Republican governing committees therein. That such respective recognized committees are hereby authorized to designate the time and place for the selection or election of the Delegates and Alternates to the National Convention, and that the respective committees, through their chairmen and secretaries, are authorized to issue the necessary certificates of election.

(h) Election of Delegates shall be certified in every case where they are elected by conventions, by the chairman and secretary of such conventions respectively; and in case of election by primary, they shall be certified to by the proper official, and all certificates shall be forwarded by said duly elected Delegates and Alternates in the manner herein provided.

(i) All Delegates or Alternates shall be elected not later than thirty (30) days before the date of the meeting of said Republican National Convention, unless otherwise provided by the laws of the State in which the election occurs. No Delegates or Alternates shall be deemed eligible to participate in any convention to elect Delegates to the said Republican National Convention, who were elected prior to the date of this Call.

(j) No State, Territory, Territorial Possession or the District of Columbia shall elect a greater number of persons to act as Delegates and Alternates than the actual number of Delegates and Alternates respectively to which they are entitled under the Call, and no unit of repre-



sentation may elect any Delegate or Delegates, or their Alternates, with permission to cast a fractional vote.

#### FILING OF CREDENTIALS AND CONTESTS

(a) Twenty days before June 9, 1936, the credentials of each Delegate and Alternate shall be forwarded to the Secretary of the Republican National Committee, Barr Building, Washington, D. C., for use in making up the temporary roll of the Convention, except in the case of Delegates or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs, rendering impossible filing of credentials within the time above specified.

(b) Notices of contests shall be forwarded in the same manner and within the same time limit. Where more than the authorized number of Delegates or Alternates from any State, Territory, Territorial Possession, or District of Columbia are reported to the Secretary of the Republican National Committee, a contest shall be deemed to exist and the Secretary shall notify the several claimants so reported, and shall submit all such credentials and claims to the Whole Committee for decision to which claimants reported shall be placed upon the temporary roll of the Convention; provided, however, that the names of the Delegates and Alternates presenting certificates of election from the canvassing board or officer created or designated by the law of the State in which the election occurs, to canvass the returns and issue certificates of election to Delegates to National Conventions of political parties in a primary election, shall be placed upon the temporary roll of the Republican National Convention.

(c) All notices of contests shall be in writing, accompanied by a printed statement setting forth the grounds of the contests, and must be filed with the Secretary of the Republican National Committee at least twenty days prior to June 9, 1936, except in the case of Delegate or Alternates elected at a time or times in accordance with the laws of the State in which the election occurs, rendering impossible the filing of notices of contests within the time above specified.

(d) The Secretary of the Republican National Committee is hereby directed to promulgate this Call by sending a copy thereof to the two members of the Republican National Committee from each State, Territory, Territorial Possession and the District of Columbia, and to inclose therewith copies of the Call for the Chairman and Secretary respectively of the State Central Committee or governing committee of the party therein, to be forwarded to said Chairman and Secretary respectively by

the members of the Republican National Committee in and for said State. In case of a vacancy in membership on the Republican National Committee, copies of the Call shall be forwarded directly by the Secretary of the Republican National Committee to the Chairman and Secretary of the Republican State Central Committee or governing Committee of the party in said State, Territory, Territorial Possession or District where such vacancy exists.

[Here follows the apportionment of 1,003 delegates to the various states and territories, including two delegates-at-large subsequently allotted to the Philippines.]

HENRY P. FLETCHER, *Chairman*

GEORGE DEB. KEIM, *Secretary*

#### **b. Call for Democratic Convention, 1936**

[*Official Proceedings, Democratic National Convention, 1936*, pp. 25-26.]

*To whom it may concern:*

By authority of the Democratic National Committee, a national convention of the Democratic Party is hereby called to meet in the city of Philadelphia in the State of Pennsylvania on the 23rd day of June, 1936, at 12 o'clock noon, for the purpose of nominating a candidate for President and a candidate for Vice President of the United States, to promulgate a platform and to take such other action as may be deemed advisable.

The basis of representation at such national convention shall be two delegates with one vote each for each Senator and Representative in Congress from the respective States; and the District of Columbia, Hawaii, Puerto Rico, Alaska, and Canal Zone shall be entitled to six delegates each, and the Virgin Islands shall be entitled to two delegates.

One alternate is to be elected for each delegate.

No State or Territory shall elect any number of delegates with their alternates in excess of the quota to which such State or Territory may be entitled under the basis of representation herein indicated; provided, however, that in order that opportunity may be afforded the various States to give adequate representation to women as delegates at large without disturbing prevailing party custom, there may be elected four delegates at large for each Senator in Congress with one-half vote each in the national convention; and further it is recommended to the States that one-half of the delegates at large shall be women.

(Signed) JAMES A. FARLEY, *Chairman*

## 49. PRESIDENTIAL PRIMARY

Until 1912, the delegates to the national conventions were chosen by state district conventions, and thus the representation of the voter was only indirect. Beginning with the campaign of 1912, a number of states have provided for the election within each party of delegates to the national convention, or for popular preference on presidential candidates, or for both. The purpose of a presidential primary, as it is called, is clearly to permit the voters of each party to have a more direct voice in the selection of the presidential candidate; but the failure of most states to adopt the system, as well as other considerations in its operation, have prevented its complete success in that respect.

## a. Presidential Primary Law of Illinois

[Act approved July 6, 1927, as amended. *Illinois Election Laws* (ed. 1939), pp. 132-145.]

6. . . . A primary shall be held on the second Tuesday in April in every year in which a President of the United States is to be elected for the purpose of electing delegates and alternate delegates to National nominating conventions and for the purpose of securing an expression of the sentiment and will of the party voters with respect to candidate for nomination for the office of President of the United States. A primary shall be held on the second Tuesday in April in every year in which officers are to be voted for on the first Tuesday after the first Monday in November of such year, for the nomination of candidates for such offices as are to be voted for at such November election. . . .

10. . . . (b) All State conventions shall be held on the first Friday after the second Monday next succeeding the April primary at which committeemen are elected. The State convention of each political party shall have power to make nominations of candidates of its political party for the electors of President and Vice-President of the United States and for Trustees of the University of Illinois, and to adopt any party platform, and to choose and select delegates and alternate delegates at large to National nominating conventions. . . .

28. . . . The name of no candidate for nomination, or State central committeeman, or township committeeman, or precinct committeeman, or ward committeeman or candidate for delegate or alternate delegate to National nominating conventions, shall be printed upon the primary ballot unless a petition for nomination shall have been filled in his behalf as provided in this Act in substantially the following form: [then follow detailed provisions with respect to the form of the petition] . . .

Such petitions for nominations shall be signed:

(a) If for a State office, by not less than five thousand (5,000) or more than ten thousand (10,000) primary electors of his party.

(b) If for a congressional office or for delegate or alternate delegate to a National nominating convention by at least one-half of one per cent of the qualified primary electors of his party in his congressional district, as the case may be. . . .

29. . . . Any candidate for President of the United States may have his name printed upon the primary ballot of his political party by filing in the office of the Secretary of State not less than sixty (60) days prior to the date of the April primary, in any year, a petition signed by not less than three thousand (3,000) or more than five thousand (5,000) primary electors, members of and affiliated with the party of which he is a candidate, and no candidate for President of the United States, who fails to comply with the provisions of this Act shall have his name printed upon any primary ballot: provided, that the vote for President of the United States, as herein provided for, shall be for the sole purpose of securing an expression of the sentiment and will of the party voters with respect to candidates for nomination for said office, and the vote of the State at large shall be taken and considered as advisory to the delegates and alternates at large to the National conventions of the respective political parties, and the vote of the respective congressional districts shall be taken and considered as advisory to the delegates and alternates of said congressional districts to the National conventions of the respective political parties.

. . . . .

#### **b. Presidential Primary Law of Massachusetts**

[Originally approved Mar. 15, 1912; amended June 29, 1938. *Acts and Resolves of Massachusetts, 1938*, pp. 605-607.]

#### **CHAP. 53. PROVISIONS APPLYING TO PRESIDENTIAL PRIMARIES**

*Section 70B.* In any year in which candidates for presidential electors are to be elected, the election of delegates and of alternate delegates to national conventions of political parties shall be by direct plurality vote in primaries. The number of district delegates and the number of district alternate delegates, not less than one from each congressional district, and the number of delegates and alternate delegates at large, shall be fixed by the state committee, who shall give notice thereof to the state secretary on or before the third Wednesday in February. . . .

*Section 70E.* The state secretary shall cause to be placed on the official ballot for use at presidential primaries, under separate heading and in the following order, the names of candidates for delegates at large, alternate delegates at large, district delegates, and alternate district delegates to national conventions. The names of candidates appearing in nomination papers containing nominations for all the places to be filled shall be placed first on said ballot, arranged in groups and in the same order as in the nomination papers. The order in which the groups shall appear shall be determined by lot in the manner provided in section 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

*Section 70F.* Upon the receipt of the records of the vote cast at presidential primaries and within four days after said primary the city or town committee shall forthwith canvass the same and make return of the votes for delegates at large, alternate delegates at large, district delegates and alternate district delegates and for election as members of the state committee to the state secretary, who shall forthwith canvass such returns, determine the results thereof, notify the successful candidates, and certify to the state committees the names of the persons elected as members of state committees. . . .

*Section 70G.* In case of the death, withdrawal or ineligibility of a candidate for delegate or alternate delegate to a national convention, the vacancy may be filled in any manner which is clearly provided for in the nomination paper placing such candidate in nomination, before the signature of any voter is entered thereon, otherwise the remaining candidate or candidates nominated by the same nomination paper may fill the vacancy. In case of a withdrawal, such vacancy must be filled by filing in the office of the state secretary, within seventy-two week-day hours succeeding five o'clock in the afternoon of the last day for filing withdrawals, a statement signed by the person or persons authorized to fill the vacancy.

ing the name and residence of the candidate nominated, accompanied by his written acceptance.

*Section 70H.* The provisions of law relating to primaries and nomination papers consistent with the five preceding sections shall apply to presidential primaries, so far as practicable.

## 50. CONDUCT OF THE NATIONAL CONVENTION

The national conventions operate under strict rules of procedure, adopted for each convention. These rules usually follow very closely the rules of procedure in the House of Representatives, but some are unique, such as the traditional two-thirds and unit rules of Democratic conventions, the two-thirds rule being finally abandoned in 1936. Tense and dramatic situations are numerous, and at times the delegates conduct themselves as a mob, rather than as accredited representatives engaged in the serious business of naming presidential candidates.

### a. Speech Nominating Governor Lowden, 1920

[*Official Proceedings, Republican National Convention, 1920*, pp. 126-129.]

THE PERMANENT CHAIRMAN.—The Secretary will continue calling the roll for further nominations for the office of President.

A READING CLERK (MR. WILL A. WAITE, of Michigan).—Arkansas—

MR. H. L. REMMEL, of Arkansas.—Arkansas yields to Illinois. (Applause.)

THE PERMANENT CHAIRMAN.—Has Illinois a candidate to present to the Convention?

MR. FRANK L. SMITH, of Illinois.—Representative Rodenberg is now on his way to the platform.

At this moment Representative Rodenberg advances to the front of the platform and is greeted with vociferous applause.

THE PERMANENT CHAIRMAN.—The chair presents Representative William A. Rodenberg of Illinois to present the name of Governor Lowden. (Great applause.) The Convention will please be in order and listen to Representative Rodenberg.

### MR. RODENBERG NOMINATING GOVERNOR LOWDEN

MR. WILLIAM A. RODENBERG, of Illinois.—Mr. Chairman, Delegates to the National Republican Convention, Ladies and Gentlemen: I desire to thank my friend from Arkansas for his courtesy in yielding to the State of Illinois, and I wish to assure him and his fellow delegates that



his kindness is appreciated by the delegation to which I have the honor to belong. (Applause from the Illinois delegation.)

At no time since the birth of the Republican party has there been greater need for the exercise of calm, deliberate and dispassionate judgment in the selection of a standard bearer than there is today. A spirit of rebellious unrest is abroad in the land. On all sides are heard murmurings of discontent. The times are pregnant with the prophesy of gloom and despair. Confidence has disappeared and the splendid optimism of former days, once our proudest national asset, has given way to an ever present fear of impending disaster.

For seven years the ship of state, straining in every timber, has been drifting in a sea of uncertainty, its pilot confused and bewildered by strange voices in the air and lured on in its vacillating course by false lights along the shore. Nine anxious months still lie before us, and if, perchance, it should be our good fortune to avoid the rocks of destruction it will be due solely to the mysterious workings of a merciful Providence that guides and protects the destiny of a chosen people in their time of trial and tribulation. (Applause.)

I know that I voice the sentiment of every patriotic American when I express the hope that God will speed the day when a better and braver pilot shall be placed at the helm—one who is ready and willing in times of stress and storm to read the chart and compass of experience; one who can restore discipline among officers and crew and inspire the courage that is born of confidence; one who will steer a straight and steady course through the troubled waters of national disorder and again find refuge in the harbor of national safety and security. To find such a pilot is the imperative duty of the Republicans assembled in convention today. (Applause.)

My friends, three score years ago, at a time when the passions of men were stirred to the depths, when the horizon of the republic's future was darkened by the clouds of approaching conflict, when the very perpetuity of "government of the people, by the people, and for the people" was trembling in the balance, the nation turned for leadership to the state of Illinois. (Applause.) Here, on the broad and fertile prairies of this great state, so open that truth could find no hiding place, was found a man of the people, a leader of leaders, the apotheosis of freedom's holy light, our Lincoln, the world's Lincoln. (Applause.) Grandly, nobly, sublimely he met the test. Patiently he pressed forward in the great task that lay before him and today he stands acclaimed as America's greatest contribution to the world's heritage of great and noble men. (Applause.)

Illinois, the State whose soil has been sanctified by the blood of the immortal Lovejoy, our first great martyr to the cause of free press and speech, gave Abraham Lincoln to the nation in 1860, and Illinois, the State that is still the wellspring of Republican hope and inspiration, stands ready in 1920 to consecrate to the service of the republic another of her great sons—one, whose brilliant record of public and private achievements is the very best and surest guaranty that under his leadership our beloved country will be raised from the obloquy into which it has fallen and again placed on the road that leads to national honor and national glory. (Applause.)

We present him to you because we believe in his rugged Americanism, the Americanism that comes from the close contact with the plain people. Born of humble parentage in the State of Minnesota, his early youth and young manhood were spent on a farm in the State of Iowa. It was there, close to nature and nature's God, the great school of human experience, the school that has given to the nation its best and truest men, that he formed those sterling traits of character that have ruled his life and have left their impress upon his every act. (Applause.)

We present him to you because we know him to be a manly man of courage and conviction, endowed with the genius of common sense, faithful and fearless, whose every heart beat is in full sympathy with the noblest aspirations of his fellowmen. (Applause.)

We present him to you because he stands for law and order and constitutional government. Of fine legal mind and training, with both legislative and executive experience, he believes in re-establishing the powers and prerogatives of every branch of a federal government as set forth by the fathers in the constitution itself and he is unalterably opposed to executive usurpation of any legislative or judicial function. (Applause.)

We present him to you because his records demonstrate that he has a clear and comprehensive conception of the proper relations of capital and labor to each other. His work as member of Congress and as governor of a great industrial State, with all its complex and diversified interests, stamps him as the living embodiment of the doctrine of the "square deal." He believes in the interdependence of employe and employer and in all of his official acts he has accorded to each exactly the same measure of protection under the law. (Applause.)

We present him to you because he typifies more than any one of the distinguished gentlemen who will be placed in nomination before this Convention the great, vital issue of economy in the administration of public affairs. He believes in the application of sound and practical

business principles to the conduct of government and as proof of that belief we point to the decreased tax rate and the increased administrative efficiency of the state over whose destinies he presides today. (Applause.)

We present him to you because he is in full accord with the true spirit of America which still prefers the nationalism of Theodore Roosevelt to the internationalism of Woodrow Wilson. He believes that the sovereignty of the United States must be kept free and inviolate from European influence or dictation and that, while maintaining a friendly attitude toward all nations, we owe it to those who have gone before and to those who are to follow us to enter into partnership with none. (Applause.)

We present him to you because of him the American flag, whose stars and stripes have been baptized in the best blood of American patriotism, symbolizes the strength and the power and the majesty of a mighty nation and he believes that that flag should command respect at home and abroad and give full and ample protection to the humblest American citizen, wherever it may be unfurled to the breeze. (Applause.)

Delegates, a solemn responsibility rests upon the Republican party today. Many difficult and perplexing problems, social, economic and industrial, growing out of the world war are pressing for solution. The best constructive ability of our great constructive party must be utilized in the solution of these problems. In the crucial and critical period upon which we have now entered the nation demands as its chief executive a man of clear brain and steady nerve, a man of visions but not a visionary, a man of ideals but not an idealist, a man of works and not of words. (Applause.)

Illinois has such a man.

We present him to you as our candidate for President.

We present the patriotic governor of a patriotic State, Frank Orren Lowden.

Representative Rodenberg concluded his speech at 11:34 a.m., and as he uttered the words "Frank Orren Lowden" there was a tremendous outburst of applause. A member of the Illinois delegation grabbed the Illinois standard and started around the hall, other members of the delegation carrying flags and pictures of Lowden, and in their train came the delegates from Iowa, Kentucky, Virginia, Connecticut, Oklahoma, carrying the State's standards. Hundreds of pictures of Lowden, large and small, were carried by members of the several delegations. The Kentucky delegation carried a banner bearing the words "Every traveling man wants a business man for President—Lowden." As the delegates

marched around the hall they chanted "Lowden, Lowden, Frank O. Lowden."

THE PRESIDING OFFICER (MR. ALBERT J. BEVERIDGE, of Indiana) rapped for order at 12:15 p.m. but was met by an increased volume of cheering and cries "Lowden, Lowden, Frank O. Lowden." Order was finally restored at 12:20 p.m., the demonstration having continued for 46 minutes.

### **b. Demonstrations in Democratic Convention, 1924**

[Accounts in *N. Y. Times*, reprinted in *Literary Digest*, July 12, 1924.]

Inside, sitting nearly in the center of the New York delegation, with a large megaphone handy, James J. Hoey, one of the chief lieutenants in the Smith campaign, arose occasionally before the proceedings began and scanned what might be termed the horizon. Once or twice he spoke to a more agile-appearing individual, who hurried away.

More people who gathered about the doors earlier, some hundreds across the streets that surround the Garden, congestion in the aisles a little more noticeable—these were the outward, the visible signs of something about to happen.

Very few persons indeed knew just what would happen. The delegates from far-away States and delegates pledged, and willingly, to other candidates were all talking of the coming Smith demonstration as they found their ways slowly to their seats.

From the start there was much whispered conferring in the New York delegation. And here and there about the hall, on the floor among the delegates, as well as in the galleries, were noise-making machines, attached to boards. They were of the sort that give out a sound rather closely resembling the prolonged shouting of a great crowd. Some of them were carefully covered with coats.

To one who passed from delegation to delegation on the floor, as Mr. Roosevelt was speaking, it was clear that the former Vice-Presidential candidate was a favorite and that he was being listened to with much more attention than is accorded to most convention speakers.

Now and then, as applause for some point in the speech led some over-anxious booster to make a false start on the work he was designated to do, there was a giggle among the delegates. If the noise was even slightly prolonged, Mr. Hoey got up and signaled with both hands and the noise stopt. With his arms he had much better control of the convention, above the floor, than Senator Walsh with his gavel.

Several printed copies of Mr. Roosevelt's speech were being read in the New York delegation. As the speaker neared the end, Mr. Foy looked around the Garden, just as a careful stage manager might before the curtain rose on a first-night performance. The coats were taken from over the noise-making machines. The New York standard was loosened in its socket. William J. Collins, sitting in the place of Charles F. Murphy as delegate, climbed across the knees of two or three delegates and grasped the pole of the standard.

As Mr. Roosevelt finished, Mr. Collins started away from the delegation with the standard, but the other delegates remained seated. The shock battalion of paraders was really made up of outsiders, who literally poured into the place from all the entrances, having been held in leash at the doorways until the right moment.

"All set," roared a collarless and sleeveless man in the rear of the first of the east galleries as Franklin D. Roosevelt wound up his speech nominating the Governor.

His corps of helpers put their fingers on the buttons of great brass Fire Department and ambulance sirens, which were attached to cases of dry batteries.

"Go!" he shouted, as Roosevelt named his man.

The fingers prest the buttons. The connection was made. Volcanoes of sound burst forth, shrill, unearthly and horrible. It was a screech of squadrons of charging ambulances and speeding hook-and-ladder trucks, a mingled racket which New Yorkers associate with falling buildings, six-alarm fires, elevated collisions, Black Tom explosions and other great public calamities.

The collarless band in charge of these engines of public opinion stepped back and formed a group near a window looking out on Fourth Avenue. The leader made his hands a megaphone over the ears of his first lieutenant and yelled "Fine." Then they sat down and awaited developments. "Let electricity do it" was their motto.

Men and women in the seats in the immediate path of this rush of sound acted as if they had been blown out of their seats. They leaped to their feet and staggered about, shell-shocked. Although the Garden was crowded and seats at a premium, scores rushed out and never came back. The great tidal wave of falsetto notes cleared a broad swath through the whole tier and maintained it for an hour and a half.

The comparatively mild and pleasant sounds of fishhorns, cowbells and rattlers were almost swallowed up. If you were 200 feet away from fire and ambulance apparatus, you could hear the nearest two or three bells and mechanical croakers, but the rest was lost. Each of the cro-

trical screamers was worth several hundred throats. There was enough natural shouting and cheering to make one of the greatest demonstrations of its kind, but the great triumph was that of science. The electrical claque had come into its own. New Year's Eve may be turned on hereafter from an electrical socket.

The 100-volt applause was all coming from one part of the Garden and was causing vague suspicions that the Smith followers were in some way improving on nature. A courier came running up, shouted in vain in the ear of the boss of the sirens, and then wrote out instructions to deploy the artillery. Gangs of men picked up the cases of dry batteries.

Others picked up the whistles and sirens, huge affairs of nickel and brass. A group of corridor-crashers marched ahead of them, clearing the way, and new positions were taken up in order to pour a heavy fire from various angles into the wavering delegates.

Sustained electrically driven tributes for Smith were poured into the pit from three sides of the house. Streaks of empty seats here and there indicated the new positions. Surprized by the sudden rushes of sound, men and women had quit their places to save their ears.

After half an hour another liaison officer dashed up to noise headquarters. He reported a sagging in the demonstration on the north. A reserve siren was hustled over there to plug up the gap, and there was now a well-rounded circle of ear torture.

For a few minutes the squawk of fishhorns and the jangle of cowbells became very distinct on the east. A lull in the big noises had given an opportunity for the little ones. The connection of one of the battery cases had become dislocated. Some quick work was done, and in five minutes the siren was testifying its approbation of Smith again on all twelve batteries.

But the electricians had it easy. They sat back and laughed at relays of men who turned stiff cranks and ground earache out of sirens that worked by compressed air. Large wooden frames had been built to sustain these sirens and they had been adjusted to a cranking mechanism which turned hard. After struggling the great crank round and round for a few minutes, the exhausted laborer had to call for help. Five strong men were completely done out by their work on this machine.

The thirty-two-piece Sutherland Seventh Regiment Band, which dominated the McAdoo demonstration with ease and smothered all previous outbreaks on the floor, could hardly make a note heard over the electrical and compressed air testimonials to Smith.

The thirty-two musicians blew "Rosie O'Grady," "Mamie O'Rourke" and "Annie Rooney" into their horns, but they never came



out. They confided in the trombones what they do and say in the Bowery, but these matters never came to the ears of the delegates. "East Side, West Side" was done in pantomime. They blew until their cheeks were inflated to the bursting point, but that was their secret. The crowd thought they were resting.

The thousands of Smith men who packed the galleries played a valuable part in the demonstration because, altho they screamed themselves hoarse without necessity, they contributed much to the picture by waving flags and Smith banners, showering bits of torn papers and tiny flags into the air and displaying big pictures of Smith.

The Smith demonstration outdid the McAdoo demonstration by ten to one in the battle of noise, but it was like brass knuckles and black-jacks against boxing-gloves. The McAdoo followers did not understand the first principles of noise.

In the meantime, tho, with thoroughness and an entire absence of confusion, the standards of the other States that paraded had been picked up, men and women who were delegates and men and women who were not somehow flocked into the aisles.

The galleries were roaring, the unsympathetic delegates, highly interested, had climbed on their chairs, and at one end of the hall a group of stalwarts had unfurled some two-score banners bearing Governor Smith's picture, an additional band had been brought in from the northeast entrance, tho music could not be heard ten feet away, and the uninitiated might have reached the conclusion that pandemonium was reigning.

The band may be a very good band. It certainly tried hard. It made at least four false starts before Mr. Roosevelt finished his speech. It was anxious to play and later it hated to quit. Mr. Hoey said more than once before the demonstration started:

"Won't some one stop that band!"

Other Tammany men said other things to the same purport. And when the band started out with the parade it never stopt playing. Noise might come and noise might go, but that band was going to play right on. Its members were of the plodding type. Whether they were jammed in between hundreds of yelling men and women so they could not move, or whether they had fifty feet in the clear made not the slightest difference. They went right on playing. Twice the cornets had to stop, tho. The crowd was so dense they could not get their cornets to their lips. The trombone players craned their necks and resorted to the perpendicular method of operating the trombone, which is poor technique, but produces results nevertheless.

When it was decided that the Smith demonstration had sufficiently outlasted the McAdoo demonstration, couriers arrived at the place where the noise was made and most of it was turned off by pressing two or three buttons and ceasing to turn certain cranks. This gave audibility to the band and to the human demonstration. The lung work was remarkable. The withdrawal of the heavy artillery support left the shouters to their own resources, and they gave a good account of themselves. Posters and papers were done into megaphones to assist the shouting.

The band, stolidly trudging its long, long trail, apparently believed that the day does not end until the sun goes down. It played on and on and on, until Mr. Roosevelt had to cry out from the platform, "Some one stop that band!" But even in the well-organized and thoroughly disciplined hosts of Tammany, few ventured the impossible. They did not stop the band; they led it outside.

### c. Nomination of Senator Harding, 1920

[*Official Proceedings, Republican National Convention, 1920*, pp. 219-224.]

THE PERMANENT CHAIRMAN.—No candidate having received a majority of the votes in the Convention on this the ninth ballot, there is no nomination. The Secretary will proceed to call the roll of the States, etc., for the tenth ballot.

The Secretary of the Convention having proceeded with and concluded the calling of the roll of States, Territories and Territorial Possessions, the tenth ballot was announced:

Harding,  $692\frac{1}{3}$ ; Wood, 156; Johnson,  $80\frac{1}{3}$ ; Lowden, 11; Hoover,  $9\frac{1}{2}$ ; Coolidge, 5; La Follette, 24; Butler, 2; Lenroot, 1; Hays, 1; Knox, 1; absent,  $\frac{1}{2}$ ; total, 984. [Here follows a tabulation of the tenth ballot.]

The following States when first called announced their choice as shown below, but requested permission to change their votes as shown in the tabulation of the tenth ballot before the result of said ballot had been announced.

Arizona—6 for Wood.

Colorado—6 for Wood, 5 for Harding and 1 for Lowden.

Illinois—17 for Lowden,  $18\frac{1}{3}$  for Johnson, and  $22\frac{1}{3}$  for Harding.

Indiana—20 for Harding and 8 for Wood; 2 absent.

Mississippi— $21\frac{1}{2}$  for Wood and  $9\frac{1}{2}$  for Harding.

New Mexico—6 for Wood.

North Dakota—9 for Harding, 1 for Wood.

Washington—6 for Harding, 5 for Wood, 2 for Poindexter, and 1 for Hoover.

During the balloting the following occurred: . . .

When Pennsylvania was called and the Chairman of the delegation announced 60 of its 76 votes for Harding, the delegates immediately realized that Harding had been nominated. It was then 6:05 o'clock p. m., and, following a volley of applause, the Ohio delegation seized their standard, pictures of Harding and flags, and began a parade around the aisles. Amidst the din of cheering could be heard cries of "Hurrah for the next President," "Hurrah for Ohio," "Hurrah for the Master of Presidents," but after the Ohio delegation, joined by delegates from other delegations, had encircled the inclosure marking off the delegates, the Chairman began rapping for order. Thereupon the Ohio delegation took the lead in helping to restore order, and at 6:13 o'clock the calling of the roll was resumed.

And at the conclusion of the roll call the following occurred:

MR. HARRY S. NEW, of Indiana.—Mr. Chairman, the two absent delegates from Indiana returned and expressed their choice. The vote of Indiana on this ballot will therefore be, Wood 9, Harding 21. We request that when the ballot is announced that Indiana be so recorded.

A NORTH DAKOTA DELEGATE.—Mr. Chairman, North Dakota desires to change its vote, announced during the roll call, and to cast the unanimous vote of the State, 10, for Senator Harding. (Applause)

AN ARIZONA DELEGATE.—Mr. Chairman, Arizona desires to change its vote from Wood to Harding. (Applause.)

A WASHINGTON DELEGATE.—Mr. Chairman, the State of Washington now wishes to cast a unanimous ballot for Senator Harding. (Applause.)

A NEW MEXICO DELEGATE.—Mr. Chairman, the New Mexico delegation desires to change its vote and to cast a unanimous ballot for Senator Harding. (Applause.)

A COLORADO DELEGATE.—Mr. Chairman, Colorado wants to change its vote and cast a solid ballot for Senator Harding. (Applause.)

A voice then rang out amidst the din of shouting, "Mr. Chairman, don't let them all get on the band wagon," which was greeted by loud laughter and applause.

MR. FRANK L. SMITH, of Illinois.—Mr. Chairman, Illinois desires to change its vote. Sixteen of the seventeen votes cast for Governor Lowden on the roll call should be changed to Senator Harding. (Applause.)

A MISSISSIPPI DELEGATE.—Mr. Chairman, Mississippi wants to cast its solid ballot for Senator Harding.

THE PERMANENT CHAIRMAN.—The Convention will be in order so that the Secretary may announce the ballot.

Thereupon the ballot was announced as heretofore shown just preceding the tabulation of the vote.

MR. JOSEPH S. FRELINGHUYSEN, of New Jersey.—Mr. Chairman, on behalf of the State of New Jersey, I now move that the nomination of Senator Harding be made unanimous.

MR. FRANK L. SMITH, of Illinois.—Mr. Chairman, Illinois seconds that motion.

THE PERMANENT CHAIRMAN.—Ladies and Gentlemen of the Convention, the question is, shall the nomination of Senator Harding be made unanimous? Those in favor of the motion will signify it by saying aye. (A loud chorus of ayes.) Those opposed will signify it by saying no. (A few noes apparently from the Wisconsin delegation, greeted by a storm of hisses from other delegates and the galleries.) The Chair declares Senator Warren G. Harding of Ohio unanimously nominated for President. (Applause, loud and prolonged.)

## CHAPTER IX

### THE PRESIDENT: POWERS AND FUNCTIONS

#### 51. POWER OF PATRONAGE

The President's power of appointment is among his most important powers, and has grown enormously with the expansion of governmental activities and the creation of additional offices. The power to dispense this "patronage," as it is called, gives the President the opportunity, within certain limits, to build up a smoothly working administrative machine which will carry out his policies, to strengthen himself politically throughout the country, and to secure congressional support for his policies. In view of the immense number of appointments that the President must make, it is obvious that he cannot possibly be personally familiar with all the candidates for such appointments or their qualifications, and must rely largely upon recommendations. Hence the practice has developed that appointments to federal office in any state shall be made only after consultation with the Senators or Representatives from that state, who are of the President's party. If there are no members of Congress of that party, the recommendations will usually be made by the leaders of the party organization in the state concerned. These persons, rather than the President, become therefore most frequently the actual patronage dispensers.

##### a. President Lincoln's Use of Patronage

[Dana, *Recollections of the Civil War*, pp. 174-177; reprinted in Beard, *American Government and Politics* (4th ed., The Macmillan Company), pp. 215-216.]

Lincoln was a supreme politician. He understood politics because he understood human nature. I had an illustration of this in the spring of 1864. The administration had decided that the Constitution of the United States should be amended so that slavery should be prohibited. This was not only a change in our national policy, but it was also a most important military measure. It was intended not merely as a means of abolishing slavery forever, but as a means of affecting the judgment and the feelings and the anticipations of those in rebellion. It was believed that such an amendment to the Constitution would be equivalent to new armies in the field, that it would be worth at least a million men, that it would be an intellectual army that would tend to paralyze the enemy and break the continuity of his ideas.

In order thus to amend the Constitution, it was necessary first to have the proposed amendment approved by three fourths of the states. When

that question came to be considered, the issue was seen to be so close that one state more was necessary. The state of Nevada was organized and admitted into the Union to answer that purpose. I have sometimes heard people complain of Nevada as superfluous and petty, not big enough to be a state; but when I hear that complaint, I always hear Abraham Lincoln saying, "It is easier to admit Nevada than to raise another million of soldiers."

In March, 1864, the question of allowing Nevada to form a state government finally came up in the House of Representatives. There was strong opposition to it. For a long time beforehand the question had been canvassed anxiously. At last, late one afternoon, the President came into my office, in the third story of the War Department. . . .

"Dana," he said, "I am very anxious about this vote. It has got to be taken next week. The time is very short. It is going to be a great deal closer than I wish it was."

"There are plenty of Democrats who will vote for it," I replied. "There is James E. English, of Connecticut; I think he is sure, isn't he?"

"Oh, yes; he is sure on the merits of the question."

"Then," said I, "there's 'Sunset' Cox, of Ohio. How is he?"

"He is sure and fearless. But there are some others that I am not clear about. There are three that you can deal with better than anybody else, perhaps, as you know them all. I wish you would send for them."

He told me who they were; it is not necessary to repeat the names here. One man was from New Jersey and two from New York.

"What will they be likely to want?" I asked.

"I don't know," said the President; "I don't know. It makes no difference, though, what they want. Here is the alternative: that we carry this vote, or be compelled to raise another million, and I don't know how many more, men, and fight no one knows how long. It is a question of three votes or new armies."

"Well, sir," said I, "what shall I say to these gentlemen?"

"I don't know," said he; "but whatever promise you make to them I will perform."

I sent for the men and saw them one by one. I found that they were afraid of their party. They said that some fellows in the party would be down on them. Two of them wanted internal revenue collector's appointments. "You shall have it," I said. Another one wanted a very important appointment about the custom house of New York. I knew the man well whom he wanted to have appointed. He was a Republican,



though the congressman was a Democrat. I had served with him in the Republican county committee of New York. The office was worth perhaps \$20,000 a year. When the congressman stated the case, I asked him, "Do you want that?"

"Yes," said he.

"Well," I answered, "you shall have it."

"I understand, of course," said he, "that you are not saying this on your own authority?"

"Oh, no," said I; "I am saying it on the authority of the President."

Well, these men voted that Nevada be allowed to frame a state government, and thus they helped secure the vote which was required. The next October, the President signed the proclamation admitting the state. In the February following, Nevada was one of the states which ratified the Thirteenth Amendment by which slavery was abolished by constitutional prohibition in all of the United States.

#### **b. Method of Handling Patronage under President McKinley**

[Croly, *Marcus Alonzo Hanna: His Life and Work* (The Macmillan Company), pp. 296-298.]

Seldom has any administration after three years in office commanded such united support from its party as in the beginning of 1900 did the administration of Mr. McKinley. Much of the credit of this result belongs to the diplomacy with which the President handled the Republican leaders in and out of Congress. He had the gift of refusing requests without incurring enmity, of smoothing over disagreements, of conciliating his opponents, of retaining his friends without necessarily doing too much for them, of overlooking his own personal grievances and of steering the virtuous middle path between the extremes and eccentricities of party opinion. But decisive as was the President's contribution to the popularity of his administration, Mr. Hanna also deserves a certain share of the credit. More than any other single man, with the exception of the President himself, Mr. Hanna was responsible for the operation of that most vital of party functions, the distribution of patronage. Under his direction and that of the President the appointments to office became, as it rarely had been in the past, a source of strength to the McKinley administration.

During these years Mr. Hanna accomplished in an exceptionally able manner the work of reinforcing and consolidating the existing leadership of the Republicans. The distribution of patronage necessarily

casions many personal disappointments and grievances, which weaken the President with certain individuals and factions in his party. Any disposition on the part of the President or his responsible advisers to play favorites or to cherish grudges, any tendency to misjudge men and to be deceived by plausible misrepresentations, any failure to distinguish properly between the more influential and the less influential factions, has a damaging effect upon party harmony and its power of effective co-operation. To name only recent examples Mr. Cleveland, Mr. Harrison and Mr. Taft have all weakened their administrations by mistakes in selections to office. No doubt President McKinley and Mr. Hanna made similar mistakes both from the point of view of administrative efficiency and of good feeling within the party, but on the whole they certainly exercised the President's power of appointment with unusual success. They not only selected for the higher offices efficient public servants, but by virtue of an unusually clear understanding of individuals and local political conditions, they made leading Republicans feel, in spite of certain individual grievances, that the offices were being distributed for the best interests of the whole party.

So far as Mr. Hanna was concerned, this success was due to his usual ability in partially systematizing and organizing the distribution of offices, while at the same time giving life to the system by tact and good judgment in dealing with individuals and with exceptional cases. In all those Northern states in which the Republicans exercised effective power, the system was already established and required merely good judgment in its application. It was in the South that he introduced a new and what he believed to be a definite system of making Federal appointments. The local offices were usually filled on the recommendation of the defeated congressional candidate, and Mr. Hanna expected by the recognition of these leaders of forlorn hopes to induce a better quality of men to run for the office. For the higher Federal offices, such as the United States Judges and Attorneys, the recommendations were usually accepted of a Board of Referees—consisting of the defeated candidate for Governor, the chairman of the State Committee, and the member of the National Committee from that state. To a large extent the system worked automatically all over the Union, but of course any such method goes to pieces, in so far as conflicting individual or factional claims are intruded. It was in dealing with these exceptional cases that Mr. McKinley's tact was useful as well as Mr. Hanna's gift of understanding other men, of getting their confidence and of bending or persuading them to his will.

**c. President Harding and Patronage**

[Correspondence between President Harding and I. C. Thoresen, Surveyor General of the Land Office for the District of Utah. *N. Y. Times*, Sept. 23, 1921.]

September 3, 1921.

My dear Sir:

Those of us who are responsible for the activities of the new Administration never like to do anything in an inconsiderate way. We are anxious to have men in positions of responsibility who are in full sympathy with the purposes and plans of the Administration. I need not tell you of the current demand for the recognition of aspirants with our party for consideration in the matter of patronage. I take you to be a practical man who knows of these developments with a sweeping change in national administration. Under all these circumstances I would very much like to have a new appointment in the office which you occupy. In all courtesy I would infinitely prefer to have you recognize the situation and make your resignation available. I am writing this letter in a kindly spirit to express a request that you recognize the situation and let me deal with the situation as you would probably wish to do if our positions were reversed.

Very truly yours,

WARREN G. HARDING

September 9, 1921

My dear Mr. President:

The receipt of your courteous, considerate and outspoken letter of the 3d is very greatly appreciated, and especially so in comparison with the short, formal note of the Acting Secretary of the Interior requesting my resignation.

I cannot understand how the plans and policies of the Administration can in any way change or modify the formal duties of a Surveyor General. The surveys of the public lands under the specific direction and appropriations by Congress, making and approving plans and field notes thereof, and paying the expenses incurred thereby, are the sole duties of said office. Every employe therein is in the civil service. No material changes have been or can be made by any Administration.

Were this service affected by foreign policies or even domestic conditions, I would admit the consistency for a change, but in face of the facts I cannot do so. If, however, any minor changes in the adminis-

tration of the duties of the office for its improvement are desired by the department, I am ready and willing to assist in their introduction, as I am an interested citizen of our glorious country much more than a partisan Democrat. I am in full and complete sympathy with every move for economical efficiency in the public service. I offer the entire record of my administration in this and other public offices I have held as proof of my integrity in serving the public efficiently, and of the economical expenditure of public funds.

It is well known that the demand for recognition of the Republican aspirants is exceedingly intense. But should all precedents of the past be set aside to pacify this partisan, selfish clamor? All of my predecessors have been permitted to serve their full terms; most of them more; the last served thirteen months after President Wilson's inauguration.

It therefore appears to me that I am the first and only person in the public service under an appointment for a specific term who has been requested to resign without being accused of any definite failure or neglect of duty. This matter has the appearance of personal spite or extreme radical political prejudice or greed, and I would be very sorry indeed should you lend the power of your great office—the greatest in all the world—for the success of such motives.

I have lived in Utah for nearly sixty years and my friends and relatives here are legion, and for their sakes, as well as for my own sake, I desire to maintain my good name and standing, which I consider I cannot if I resign this office without good reasons made public and a general ousting of all other Democratic office holders.

It would certainly be considered a blemish upon my character and integrity, and I, therefore, cannot consistently comply with your courteous appeal.

Very respectfully,

I. C. THORESEN

## 52. SENATORIAL COURTESY

The practice of the President in consulting members of Congress before making appointments in their states has been pointed out. Senators are particularly able to insist upon their right to be consulted in view of the requirement of senatorial confirmation. In connection with such appointment and confirmation the practice has been further developed that the Senate will generally as a matter of course and without inquiry into qualifications refuse to confirm appointments, if objection is made by the Senator or Senators from the state concerned, provided only they are of the President's own party. This readiness of the Senators to support one

another in the matter of patronage is called "senatorial courtesy." Dramatic examples of the working of the rule are the case of F. Roy Yoke (W. Va.), confirmed (46-15) for Collector of Internal Revenue, Jan. 11, 1938, over the opposition of Senator Holt, probably because supported by Senator Neely of the same state and party; and the case of Judge Floyd H. Roberts (Va.), overwhelmingly rejected (72-9) for U. S. District Judge, Feb. 6, 1939, although already serving under recess appointment, because objected to by Senators Glass and Byrd.

### a. Custom of Senatorial Courtesy

[*Congressional Record*, vol. 62, pt. 7, pp. 6555-6557.]

[The Senate having under consideration the nomination of Nat Goldstein to be Collector of Internal Revenue in Missouri, the following colloquy occurred, May 9, 1922:]

MR. HARRISON. May I ask the Senator another question? Has an action been taken touching the Nat "Goldstein" nomination? . . .

MR. McCUMBER. Oh, no. Let me state to the Senator what is the usual course in such matters. The moment any nomination is sent to the committee, the chairman hands that nomination to some Senator and asks him to consult with both the Senators from the State of the nominee to ascertain whether the nomination is satisfactory to them.

That is the first step to be taken, and it is the step which always has been taken, whether the Democratic Party or the Republican Party has been in control. If the nomination is satisfactory and if it is so reported to the committee, the committee act upon it. If, however, any extraneous matters have come to the attention of the committee to indicate that there will be opposition to the nomination, then, of course, the nomination is held in abeyance until such opposition may be heard.

### b. Roberts Case

[Letter of President Roosevelt to Judge Floyd Roberts, Feb. 7, 1939.  
Text in *White House Press Releases*, Feb. 7, 1939.]

My dear Judge Roberts:

I feel that in justice to you and your family I should write to you in regard to the refusal of the Senate to confirm your appointment as United States District Judge for the Western District of Virginia.

First of all, I tender you my thanks for the honorable, efficient and in every way praiseworthy service that you have rendered to the people of the United States in general and to the people of the Western District of Virginia in particular.



Second, I wish it known that not one single person who has opposed your confirmation has lifted his voice in any shape, manner or form against your personal integrity and ability.

In order that you may know the full history of what has occurred, I take this opportunity to summarize the story.

On March 17, 1938, I received a letter from Senator Glass enclosing a clipping from a local Virginia paper. This newspaper article, quoting an editorial in another local Virginia paper, made the assumption that it would henceforth be necessary to receive the backing of Governor Price of Virginia before any Virginian could hope for a federal appointment.

Senator Glass in his letter asked if federal appointments, for which Senate approval was necessary, would be subjected to the effective veto of the Governor of Virginia.

To this I replied on March 18, explaining to the Senator the difference between the appointive power, which is in the President, and the power of confirmation, which is in the Senate. I pointed out to the Senator that time-hallowed courtesy permits Senators and others to make recommendations for nomination, and, at the same time, that every President has sought information from any other source deemed advisable.

On March 19 Senator Glass wrote me again, covering his construction of Article II of the Constitution, and asking me again as to the accuracy of the newspaper statement. He winds up by saying "the inference is, of course, that you approve the offensive publication which was the basis of my inquiry."

I replied to this letter from the Senator on March 21 in a personal and friendly vein. I stated that I was glad that we seemed to agree in our construction of the Constitution. I told him that I was not in the habit of confirming or denying any newspaper article or editorial. Obviously if I were to begin that sort of thing, I would have no spare time to attend to my executive duties.

I told the Senator to go ahead as before and make recommendations; that I would give such recommendations every consideration; but that I would, of course, reserve the right to get opinions from any other person I might select. I ended by asking the Senator to forget the newspaper article and wished him a good vacation and expressed the hope that he would come to see me on his return.

Subsequent to this date, I received a number of recommendations for the position of United States District Judge for the western district of Virginia—among them recommendations in behalf of two gentlemen



from Senator Glass. I am not certain whether these recommendations were at that time concurred in by the junior Senator from Virginia but this is possible. Other recommendations were received from citizens of Virginia to a total number, as I remember it, of five or six.

The Attorney General was asked by me to report on these recommendations, paying attention, as usual, to the qualifications of each person suggested. I might add that your name was on this list but that at no time, to my knowledge, did you seek this office of judge.

The Attorney General and I held several conferences with the result that we concluded that you were best fitted to fill the judgeship.

As a result, I wrote on July 6 to both of the Virginia Senators stating that I had concluded to appoint you, that a number of gentlemen had been suggested for the place, but that I believed you to be the best fitted.

The following day, July 7, I received a telegram from Senator Glass stating that he and his colleague would feel obliged to object to your appointment as being personally objectionable to them, and that a matter would follow. A few days later I received a letter from the Senator stating that he could not conceive any fair reason why one of his candidates had not been appointed.

It is worth noting that neither Senator, on July 7 or subsequently, raised any question as to your integrity or ability and the only objection was that you were personally objectionable.

In regard to the original newspaper article suggesting that Governor Price had been given the veto over Federal appointments, this and similar stories are, of course, not worth answering or bothering about for the very simple reason that no person—no Governor, no Senator, no member of the Administration has at any time had, or ever will have, any right of veto over Presidential nominations. Every person with common sense knows this.

Your appointment followed, you took the oath of office, and have been serving with great credit as district judge since then.

Your name was sent by me to the Senate in January, 1939, together with many other recess appointments.

We come now to the last chapter. Your nomination was referred to the Judiciary Committee of the Senate and by the chairman of that committee to a subcommittee of three. It appears from the record that both Senators from Virginia registered their objection with the subcommittee, saying "this nomination is utterly and personally offensive to the Virginia Senators whose suggestions were invited by the Department of Justice only to be ignored."

The subcommittee reported back the nomination to the full committee

without recommendation, stating the raising of the matter of Senatorial courtesy and saying that this matter had not been a direct issue since 1913.

At a special meeting of the full Committee on the Judiciary and before the committee went into executive session, attention was invited to the presence of the Governor of Virginia, to the presence of two former Governors of Virginia and to the presence of the nominee and his counsel.

After lengthy discussion the committee went into executive session, reopening the doors an hour later.

The record shows that at this time the committee heard the Governor of Virginia in favor of the nominee and also former Governor E. Lee Trinkle and former Governor Westmoreland Davis; also George W. Warren, Esq., counsel for nominee. Thereupon the committee, instead of hearing other witnesses in behalf of the nominee, many of whom were present, moved that a list of these further witnesses be incorporated in the record without hearing them.

The committee also agreed to receive certain letters and editorials in behalf of the nominee, and, finally, a record of designations you have received from former Governors of Virginia to sit in other judicial districts, this list including many designations of you made by former Governor Harry F. Byrd.

That was followed by your own testimony.

The privilege of making the closing and sole arguments against you was accorded to the two Senators from Virginia.

Senator Glass stated that neither he nor his colleague had formally or definitely made any statement affecting your capabilities.

He proceeded to review the newspaper reports of last March, stated that he had not communicated with the Governor to ascertain whether or not the latter had authorized the publication, and spoke of his letter to me. He went on to state that the President had not answered his question up to this date, except by sending the nomination to the Senate.

You will recognize from what I have written you that as far back as last March, in reply to Senator Glass's letters, I told him categorically that I never answered any questions relating to the credibility or otherwise of newspaper articles or editorials, and I asked him to forget the newspaper article altogether. Therefore, the statement of Senator Glass to the committee does not square with the facts.

Continuing, the senior Senator from Virginia referred to other newspaper articles which spoke of "rebukes" to the Senators. It is almost

needless for me to suggest that neither you nor I pay any attention to such excuses.

Finally, Senator Glass stated "as a matter of fact, the President of the United States did give to the Governor of Virginia the veto power over nominations made by the two Virginia United States Senators." I am sorry, in view of my long personal friendship for the senior Senator, that he has made any such statement, and I can only excuse it on the ground of anger or forgetfulness.

At the end of his speech Senator Glass says, "Mr. Cummings never had the slightest idea of giving consideration to the recommendations of the two Virginia Senators, because the Governor of Virginia had been promised the right of veto on nominations that they made." Neither of these statements is true.

Senator Glass was followed by Senator Byrd, who stated that your nomination was personally offensive to both Senators, in fact, 'personally obnoxious."

At the very close of the Judiciary Committee hearing Governor Price stated "Senator Glass has made a charge against me. He is entirely mistaken about it." The Governor further stated that he was not involved in the newspaper story.

The committee thereupon abruptly closed the hearing and went into executive session, with the result, as you know, that your nomination was reported adversely to the Senate.

This brief history repeats several episodes in the history of the United States, which have occurred from time to time during the past 150 years. In other cases nominations by former Presidents of men of outstanding ability and character have been denied confirmation by the Senate, not on the plea that they were unfitted for office but on the sole ground that they were personally obnoxious to the Senator or Senators from the State from which they came.

During this whole period Presidents have recognized that the constitutional procedure is for a President to receive advice, i.e., recommendations, from Senators.

Presidents have also properly received advice, i.e., recommendations, from such other sources as they saw fit.

Thereupon Presidents have decided on nominations in accordance with their best judgment—and in most cases basing their judgment on the character and ability of the nominee. In many cases, of course, the recommendations of Senators have been followed, but in many other cases they have not been followed by Presidents in making the nominations.

Thereupon, under the Constitution, the Senate as a whole—not the Senators from one State—has the duty of either confirming or rejecting the nomination.

It is, of course, clear that it was the intention of the Constitution of the United States to vest in the Senate as a whole the duty of rejecting or confirming solely on the ground of the fitness of the nominee.

Had it been otherwise, had the Constitution intended to give the right of veto to a Senator or two Senators from the State of the nominee, it would have said so. Or to put it another way, it would have vested the nominating power in the Senators from the State in which the vacancy existed.

On somewhat rare occasions the Senate, relying on an unwritten rule of Senatorial courtesy, which exists in no place in the Constitution, has rejected nominees on the ground of their being personally obnoxious to their Senators, thus vesting in individual Senators what amounts in effect to the power of nomination.

In the particular case of which you are the unfortunate and innocent victim, the Senators from Virginia have in effect said to the President: "We have nominated to you two candidates acceptable to us; you are hereby directed to nominate one of our two candidates, and if you do not we will reject the nomination of anybody else selected by you, however fit he may be."

Perhaps, my dear Judge Roberts, the rejection of your nomination will have a good effect on the citizenship and the thinking of the whole nation in that it will tend to create a greater interest in the Constitution of our country, a greater interest in its preservation in accordance with the intention of the gentlemen who wrote it.

I am very sorry, indeed, that you have been the victim. Against you not one syllable has been uttered in derogation of your character, or ability in the legal profession or your record on the bench.

Very sincerely yours,

FRANKLIN D. ROOSEVELT

### **c. Borah Resolution**

[S. Res. 221, 75 Cong., 3 Sess., submitted by Senator Borah, Jan. 12, 1938; referred to Committee on Rules, but not reported. *Congressional Record*, vol. 83, pt. 1, p. 361.]

Whereas it has been the practice of the Senate to refuse to confirm a nominee of the President upon a statement by a Senator from the State affected that such nominee is personally offensive or personally objectionable; and

Whereas the matter of confirmation should be determined by the qualifications and fitness of the nominee, and not by the personal feelings, likes, or dislikes of a Senator ; and

Whereas such a practice transfers the power of rejection or confirmation from the Senate as a whole to a single Senator, in violation of the spirit, if not of the letter, of the Constitution : Therefore be it

*Resolved*, That the Senate discontinues and disapproves of such practice and will hereafter not respect or give effect to objections based upon the fact that said nominee may be declared personally offensive or personally objectionable to a Senator.

### 53. REMOVAL POWER

The power of removal is not mentioned in the Constitution, hence there has been doubt as to the location and extent of this power. On the whole, however, the practice was to admit the absolute power of the President to remove officials whom he may appoint, without limitation. During the quarrel between President Johnson and Congress, the correctness of that view was questioned and Congress passed the Tenure-of-Office Act, requiring the consent of the Senate to the removal of important officers. For the violation of this Act, President Johnson was impeached but not convicted, and later the act was generally assumed to have been unconstitutional and was repealed. Acting in accordance with this general view of executive power, President Wilson in 1920 removed a postmaster in Oregon, who thereupon sued in the Court of Claims for his full four years' salary on the ground that Congress had fixed the term of postmasters at four years and that the President had no constitutional power to terminate his statutory tenure by removal. The Court of Claims refused to allow the claim and finally the Supreme Court, in 1926, rendered an opinion, reviewing the whole subject of the removal power, and apparently upholding the absolute power of the President. However, the question was again raised in 1933, when President Roosevelt removed William E. Humphrey from his position as a member of the Federal Trade Commission. The reason which the President assigned for the removal in his letter to the commissioner was that "your mind and my mind do not go along together on either the policies or the administering of the . . . Commission." Humphrey refused to admit the validity of the President's action but died shortly afterwards, and his widow (now Mrs. Rathbun) brought suit in the Court of Claims to recover the salary which he would have received from the date of his removal. The Court of Claims certified two questions to the Supreme Court, which that Court in 1935 answered in such a way as to put a new interpretation on the removal power.

#### a. Myers Case

[*Myers v. United States* (1926), 272 U. S. 52, 127-177 ; 71 L. Ed. 160 170-191.]

Argued and submitted December 5, 1924. Restored to docket for reargument January 5, 1925. Reargued April 13 and 14, 1925. Decided October 25, 1926.



Appeal by claimant from a judgment of the Court of Claims dismissing a petition filed to secure salary alleged to be due to claimant, as a postmaster, whom the President had attempted to remove from office without the advice and consent of the Senate. Affirmed.

See same case below, 58 Ct. Cl. 199. . . .

Mr. Chief Justice Taft delivered the opinion of the court:

This case presents the question whether under the Constitution the President has the exclusive power of removing executive officers of the United States whom he has appointed by and with the advice and consent of the Senate. . . .

A reference of the whole power of removal to general legislation by Congress is quite out of keeping with the plan of government devised by the framers of the Constitution. It could never have been intended to leave to Congress unlimited discretion to vary fundamentally the operation of the great independent executive branch of government and thus most seriously to weaken it. It would be a delegation by the Convention to Congress of the function of defining the primary boundaries of another of the three great divisions of government. The inclusion of removals of executive officers in the executive power vested in the President by article 2 according to its usual definition, and the implication of his power of removal of such officers from the provision of § 2 expressly recognizing in him the power of their appointment, are a much more natural and appropriate source of the removing power.

It is reasonable to suppose also that had it been intended to give to Congress power to regulate or control removals in the manner suggested, it would have been included among the specifically enumerated legislative powers in article 1, or in the specified limitations on the executive power in article 2. The difference between the grant of legislative power under article 1 to Congress which is limited to powers therein enumerated, and the more general grant of the executive power to the President under article 2 is significant. The fact that the executive power is given in general terms strengthened by specific terms where emphasis is appropriate, and limited by direct expressions where limitation is needed, and that no express limit is placed on the power of removal by the executive is a convincing indication that none was intended.

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appointment and removal, provided of course that the quali-



fications do not so limit selection and so trench upon executive choice as to be in effect legislative designation. . . .

Made responsible under the Constitution for the effective enforcement of the law, the President needs as an indispensable aid to meet the disciplinary influence upon those who act under him of a reserve power of removal. But it is contended that executive officers appointed by the President with the consent of the Senate are bound by the statute law and are not his servants to do his will, and that his obligation to cause the faithful execution of the laws does not authorize him to treat them as such. The degree of guidance in the discharge of their duties that the President may exercise over executive officers varies with the character of their service as prescribed in the law under which they act. The highest and most important duties which his subordinates perform are those in which they act for him. In such cases they are exercising not their own but his discretion. This field is a very large one. It is sometimes described as political. *Kendall v. United States*, 12 Pet. 524 at p. 610, 9 L. ed. 1181, 1215. Each head of a department is and must be the President's alter ego in the matters of that department where the President is required by law to exercise authority. . . .

In all such cases, the discretion to be exercised is that of the President in determining the national public interest and in directing the action to be taken by his executive subordinates to protect it. In this field his cabinet officers must do his will. He must place in each member of his official family, and his chief executive subordinates, implicit faith. The moment that he loses confidence in the intelligence, ability, judgment or loyalty of any one of them, he must have the power to remove him without delay. To require him to file charges and submit them to the consideration of the Senate might make impossible that unity and coordination in executive administration essential to effective action.

The duties of the heads of departments and bureaus in which the discretion of the President is exercised and which we have described are the most important in the whole field of executive action of the government. There is nothing in the Constitution which permits a distinction between the removal of the head of a department or a bureau, when he discharges a political duty of the President or exercises his discretion, and the removal of executive officers engaged in the discharge of their other normal duties. The imperative reasons requiring an unrestricted power to remove the most important of his subordinates in their most important duties must, therefore, control the interpretation of the Constitution as to all appointed by him.

But this is not to say that there are not strong reasons why the President

dent should have a like power to remove his appointees charged with other duties than those above described. The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which article 2 of the Constitution evidently contemplated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control. Finding such officers to be negligent and inefficient, the President should have the power to remove them. Of course, there may be duties so peculiarly and specifically committed to the discretion of a particular officer as to raise a question whether the President may overrule or revise the officer's interpretation of his statutory duty in a particular instance. Then there may be duties of a quasi judicial character imposed on executive officers and members of executive tribunals whose decisions after hearing affect interests of individuals, the discharge of which the President can not in a particular case properly influence or control. But even in such a case he may consider the decision after its rendition as a reason for removing the officer, on the ground that the discretion regularly intrusted to that officer by statute has not been on the whole intelligently or wisely exercised. Otherwise he does not discharge his own constitutional duty of seeing that the laws be faithfully executed. . . .

The power to remove inferior executive officers, like that to remove superior executive officers, is an incident of the power to appoint them, and is in its nature an executive power. The authority of Congress given by the excepting clause to vest the appointment of such inferior officers in the heads of departments carries with it authority incidentally to invest the heads of departments with power to remove. It has been the practice of Congress to do so and this court has recognized that power. The court also has recognized in the Perkins Case that Congress in committing the appointment of such inferior officers to the heads of departments may prescribe incidental regulations controlling and restricting the latter in the exercise of the power of removal. But the court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause

enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that cause and to infringe the constitutional principle of the separation of governmental powers.

Assuming then the power of Congress to regulate removals as incidental to the exercise of its constitutional power to vest appointments of inferior officers in the heads of departments, certainly so long as Congress does not exercise that power, the power of removal must remain where the Constitution places it, with the President, as part of the executive power, in accordance with the legislative decision of 1789 which we have been considering. . . .

Summing up then the facts as to acquiescence by all branches of the Government in the legislative decision of 1789 as to executive officers whether superior or inferior, we find that from 1789 until 1863, a period of seventy-four years, there was no act of Congress, no executive act, and no decision of this court at variance with the declaration of the First Congress, but there was, as we have seen, clear affirmative recognition of it by each branch of the Government.

Our conclusion on the merits sustained by the arguments before stated is that article 2 grants to the President the executive power of the Government, i.e., the general administrative control of those executing the laws, including the power of appointment and removal of executive officers, a conclusion confirmed by his obligation to take care that the laws be faithfully executed; that article 2 excludes the exercise of legislative power by Congress to provide for appointments and removals except only as granted therein to Congress in the matter of inferior offices; that Congress is only given power to provide for appointments and removals of inferior officers after it has vested, and on condition that it does vest, their appointment in other authority than the President with the Senate's consent; that the provisions of the second section of article 2, which blend action by the legislative branch, or by part of it, in the work of the executive are limitations to be strictly construed and not to be extended by implication; that the President's power of removal is further established as an incident to his specifically enumerated function of appointment by and with the advice of the Senate, but that such incident does not by implication extend to removals the Senate's power of checking appointments; and finally that to hold otherwise would make it impossible for the President in case of political or other difference with the Senate or Congress to take care that the laws be faithfully executed. . . .

What, then, are the elements that enter into our decision of this case? We have first a construction of the Constitution made by a Congress which was to provide by legislation for the organization of the Government in accord with the Constitution which had just then been adopted, and in which there were, as representatives and senators, a considerable number of those who had been members of the Convention that framed the Constitution and presented it for ratification. It was the Congress that launched the Government. It was the Congress that rounded out the Constitution itself by the proposing of the first ten amendments which had in effect been promised to the people as a consideration for the ratification. It was the Congress in which Mr. Madison, one of the first in the framing of the Constitution, led also in the organization of the Government under it. It was a Congress whose constitutional decisions have always been regarded as they should be regarded as of the greatest weight in the interpretation of that fundamental instrument. This construction was followed by the legislative department and the executive department continuously for seventy-three years, and this, although the matter in the heat of political differences between the Executive and the Senate in President Jackson's time, was the subject of bitter controversy, as we have seen. This court has repeatedly laid down the principle that a contemporaneous legislative exposition of the Constitution when the founders of our Government and framers of our Constitution were actively participating in public affairs acquiesced in for a long term of years fixes the construction to be given its provisions. . . .

We are now asked to set aside this construction thus buttressed and adopt an adverse view, because the Congress of the United States did so during a heated political difference of opinion between the then President and the majority leaders of Congress over the reconstruction measures adopted as a means of restoring to their proper status the states which attempted to withdraw from the Union at the time of the Civil War. The extremes to which the majority in both Houses carried legislative measures in that matter are now recognized by all who calmly review the history of that episode in our Government leading to articles of impeachment against President Johnson and his acquittal. Without animadverting on the character of the measures taken, we are certainly justified in saying that they should not be given the weight affecting proper constitutional construction to be accorded to that reached by the First Congress of the United States during a political calm and acquiesced in by the whole Government for three-quarters of a century, especially when the new construction contended for has never been ac-

quiesced in by either the executive or the judicial departments. While this court has studiously avoided deciding the issue until it was presented in such a way that it could not be avoided, in the references it has made to the history of the question, and in the presumptions it has indicated in favor of a statutory construction not inconsistent with the legislative decision of 1789, it has indicated a trend of view that we should not and can not ignore. When on the merits we find our conclusion strongly favoring the view which prevailed in the First Congress, we have no hesitation in holding that conclusion to be correct; and it therefore follows that the Tenure of Office Act of 1867, in so far as it attempted to prevent the President from removing executive officers who had been appointed by him by and with the advice and consent of the Senate, was invalid and that subsequent legislation of the same effect was equally so.

For the reasons given, we must therefore hold that the provision of the law of 1876 by which the unrestricted power of removal of first class postmasters is denied to the President is in violation of the Constitution and invalid. This leads to an affirmance of the judgment of the Court of Claims.

Before closing this opinion we wish to express the obligation of the court to Mr. Pepper for his able brief and argument as a friend of the court. Undertaken at our request, our obligation is none the less if we find ourselves obliged to take a view adverse to his. The strong presentation of arguments against the conclusion of the court is of the utmost value in enabling the court to satisfy itself that it has fully considered all that can be said.

Judgment affirmed.

[Justices Holmes, McReynolds, and Brandeis dissented.]

### b. Humphrey Case

[*Rathbun v. United States* (1935), 295 U. S. 602-632; 79 L. Ed. 1611-1621.]

Mr. Justice Sutherland delivered the opinion of the Court.

. . . The following questions are certified:

"1. Do the provisions of § 1 of the Federal Trade Commission Act, stating that 'any commissioner may be removed by the President for inefficiency, neglect of duty or malfeasance in office,' restrict or limit the power of the President to remove a commissioner except upon one or more of the causes named?

"If the foregoing question is answered in the affirmative, then—

"2. If the power of the President to remove a commissioner is



stricted or limited as shown by the foregoing interrogatory and the answer made thereto, is such a restriction or limitation valid under the Constitution of the United States?" . . .

The language of the act, the legislative reports and the general purposes of the legislation as reflected by the debates, all combine to demonstrate the Congressional intent to create a body of experts who shall gain experience by length of service—a body which shall be independent of Executive authority, except in its selection, and free to exercise its judgment without the leave or hindrance of any other official or any department of the government. To the accomplishment of these purposes it is clear that Congress was of opinion that length and certainty of tenure would vitally contribute. And to hold that, nevertheless, the members of the commission continue in office at the mere will of the President, might be to thwart, in large measure, the very ends which Congress sought to realize by definitely fixing the term of office.

We conclude that the intent of the act is to limit the executive power of removal to the causes enumerated, the existence of none of which is claimed here; and we pass to the second question. . . .

The office of a postmaster is so essentially unlike the office now involved that the decision in the Myers case cannot be accepted as controlling our decision here. A postmaster is an executive officer restricted to the performance of executive functions. He is charged with no duty at all related to either the legislative or judicial power. The actual decision in the Myers case finds support in the theory that such an officer is merely one of the units in the executive department and hence inherently subject to the exclusive and illimitable power of removal by the chief executive, whose subordinate and aid he is. Putting aside dicta, which may be followed if sufficiently persuasive but which are not controlling, the necessary reach of the decision goes far enough to include all purely executive officers. It goes no farther—much less does it include an officer who occupies no place in the executive department and who exercises no part of the executive power vested by the Constitution in the President.

The Federal Trade Commission is an administrative body created by Congress to carry into effect legislative policies embodied in the statute, in accordance with the legislative standard therein prescribed, and to perform other specified duties as a legislative or as a judicial aid. Such a body cannot in any proper sense be characterized as an arm or an eye of the executive. Its duties are performed without executive leave and, in the contemplation of the statute, must be free from executive control. In administering the provisions of the statute in



respect of "unfair methods of competition"—that is to say in filling and administering the details embodied by the general standard—the commission acts in part quasi-legislatively and in part quasi-judicially. In making investigations and reports thereon for the information of Congress in aid of the legislative power it acts as a legislative agency. Under 7, which authorizes the commission to act as a master in chancery under rules prescribed by the court, it acts as an agency of the judiciary. To the extent that it exercises any executive function—distinguished from executive power in the constitutional sense—it does so in the discharge and effectuation of its quasi-legislative or quasi-judicial powers, or as an agency of the legislative or judicial departments of the government. . . .

We think it plain under the Constitution that illimitable power of removal is not possessed by the President in respect of officers of the character of those just named. The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control, cannot well be doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another cannot be depended upon to maintain an attitude of independence against the latter's will. . . .

The result of what we now have said is this: Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause will depend upon the character of the office. The Myers decision, affirming the power of the President alone to make the removal, is confined to purely executive officers. And as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

To the extent that, between the decision in the Myers case, which sustains the unrestrictable power of the President to remove purely executive officers; and our present decision that such power does not extend to an office such as that here involved, there shall remain a field of doubt, we leave such cases as may fall within it for future consideration and determination as they may arise.

In accordance with the foregoing the questions submitted are answered.

Question No. 1, Yes.

Question No. 2, Yes.

#### 54. ENFORCEMENT OF LAW

The President is required by the Constitution to "take care that the laws be faithfully executed." It is obvious, however, that in spite of this solemn injunction the vigor and faithfulness with which the laws actually are enforced will depend in large measure upon the President's sympathy with the policy involved, upon his interpretation of what the law means, and upon his conception of the exigencies of the moment. Although the responsibility of enforcement rests definitely upon the President, Congress has also on occasion undertaken in one way or another to force his hand or that of his subordinates with respect to such enforcement.

##### a. Letter of President Wilson to Attorney General McReynolds, with respect to the Anti-Trust Law

[*Senate Document No. 555, 63 Cong., 2 Sess., p. 3*]

The White House,  
Washington, July 21, 1914.

My Dear Mr. Attorney-General:

I have your letter of to-day, inclosing a copy of your letter of July 9 to Mr. J. H. Hustis, president of the New York, New Haven & Hartford Railroad Co., which together disclose the failure of the directors of the New York, New Haven & Hartford Railroad Co. to comply with the terms of the settlement proposed by them and accepted by us in the matter of their railroad holdings. Their final decision in this matter causes me the deepest surprise and regret. Their failure, upon so slight a pretext, to carry out an agreement deliberately and solemnly entered into, and which was manifestly in the common interest, is to me inexplicable and entirely without justification.

You have been kind enough to keep me informed of every step the Department took in this matter, and the action of the Department has throughout met with my entire approval. It was just, reasonable, and efficient. It should have resulted in avoiding what must now be done.

In the circumstances the course you propose is the only one the Government can pursue. I therefore request and direct that a proceeding in equity be filed, seeking the dissolution of unlawful monopoly of transportation facilities in New England now sought to be maintained by the New York, New Haven & Hartford Railroad Co., and that the criminal aspects of the case be laid before a grand jury.

(Signed) WOODROW WILSON

Hon. J. C. McReynolds,  
Attorney General

**b. Letter of President Harding to Secretary Mellon, with respect to Prohibition Enforcement**

[*Virginia Law Review*, vol. XIII, p. 95 n.]

My dear Mr. Secretary:

Supplementing my letter of instruction of October 6, relating to the enforcement of the Eighteenth Amendment and the Prohibition Enforcement Act as applied to carriers at sea, you will please direct United States customs officials to give notice to all shipping lines that pending the formulation of regulations the enforcement of the prohibition of transportation of cargoes or ship stores will not be practicable in the case of foreign vessels leaving their home ports or American vessels leaving foreign ports on or before October 14.

Any earlier attempt at enforcement, in the absence of due notice and ample regulations, would be inconsistent with just dealing and have a tendency to disrupt needlessly the ways of commerce.

This delay in full enforcement does not apply to the sale of intoxicating liquor on vessels sailing under the American flag.

Very truly yours,

WARREN G. HARDING

**c. President Harding and the Merchant Marine Act of 1920**

[Address to Congress, Dec. 6, 1921. *Congressional Record*, vol. 62, pt. 1, p. 37.]

The previous Congress, deeply concerned in behalf of our merchant marine, in 1920 enacted the existing shipping law, designed for the up-building of the American merchant marine. Among other things provided to encourage our shipping on the world's seas, the Executive was directed to give notice of the termination of all existing commercial treaties in order to admit of reduced duties on imports carried in American bottoms. During the life of the act no Executive has complied with this order of the Congress. When the present administration came into responsibility, it began an early inquiry into the failure to execute the expressed purpose of the Jones Act. Only one conclusion has been possible. Frankly, Members of House and Senate, eager as I am to join you in the making of an American merchant marine commensurate with our commerce, the denouncement of our commercial treaties would involve us in a chaos of trade relationships and add indescribably to the confusion of the already disordered commercial world. Our power to do so is not disputed, but power and ships, without comity of relation-

ship, will not give us the expanded trade which is inseparably linked with a great merchant marine. Moreover, the applied reduction of duty, for which treaty denouncement were necessary, encouraged only the carrying of dutiable imports to our shores, while the tonnage which unfurls the flag on the seas is both free and dutiable, and the cargoes which make a nation eminent in trade are outgoing rather than incoming.

It is not my thought to lay the problem before you in detail today. It is desired only to say to you that the executive branch of the Government, uninfluenced by the protest of any nation, for none has been made, is well convinced that your proposal, highly intended and heartily supported here, is fraught with difficulties and so marked by tendencies to discourage trade expansion, that I invite your tolerance of noncompliance for only a very few weeks until a plan may be presented which contemplates no greater draft upon the Public Treasury, and which, though yet too crude to offer it today, gives such promise of expanding our merchant marine that it will argue its own approval. It is enough to say today that we are so possessed of ships, and the American intention to establish a merchant marine is so unalterable that a plan of reimbursement, at no other cost than is contemplated in the existing act, will appeal to the pride and encourage the hope of all the American people.

#### **d. Joint Resolution respecting Prosecution of Oil Leases**

*[Congressional Record, vol. 65, pt. 2, pp. 1728-1729.]*

A joint resolution directing the President to institute and prosecute suits to cancel certain leases of oil lands and incidental contracts, and for other purposes.

Whereas it appears from evidence taken by the Committee on Public Lands and Surveys of the United States Senate that certain lease of naval reserve No. 3, in the State of Wyoming, bearing date April 7, 1922, made in form by the Government of the United States, through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Mammoth Oil Co., as lessee, and that certain contract between the Government of the United States and the Pan American Petroleum & Transport Co., dated April 25, 1922, signed by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, relating among other things to the construction of oil tanks at Pearl Harbor, Territory of Hawaii, and that certain lease of naval reserve No. 1, in the State of California, bearing date December 11, 1922, made in form by the Government of the United States through

Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Pan American Petroleum Co., as lessee, were executed under circumstances indicating fraud and corruption; and

Whereas the said leases and contract were entered into without authority on the part of the officers purporting to act in the execution of the same for the United States and in violation of the laws of Congress; and

Whereas such leases and contract were made in defiance of the settled policy of the Government adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security: Therefore be it

*Resolved, etc.*, That the said leases and contract are against the public interest and that the lands embraced therein should be recovered and held for the purpose to which they were dedicated; and

*Resolved further*, That the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of the said leases and contract and all contracts incidental or supplemental thereto, to enjoin further extraction of oil from the said reserves under said leases or from the territory covered by the same, to secure any further appropriate incidental relief, and to prosecute such other actions or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of the said leases and contract.

And the President is further authorized and directed to appoint, by and with the advice and consent of the Senate, special counsel who shall have charge and control of the prosecution of such litigation, anything in the statutes touching the powers of the Attorney General of the Department of Justice to the contrary notwithstanding.

## 55. ORDINANCE POWER

The function of legislation is, of course, vested primarily in Congress. It is, however, impossible to enact laws in such detail as to cover every contingency, hence it becomes frequently necessary to supplement statutes with detailed regulations. The power to make such rules and regulations is to a considerable extent vested in the President by statute, but occasionally may be exercised without any clear or specific constitutional or statutory authority, being nevertheless upheld as necessary for the proper conduct of the administration with which the President is entrusted. The power to make and issue these rules and regulations that have the force and effect of law is called the ordinance power, and may be exercised by the President himself or by his subordinates acting on his authority. The various forms through which the ordinance power is exercised are illustrated by the following examples.

**a. Proclamation with respect to War-time Prohibition**

[*U. S. Statutes*, 65 Cong., 2 Sess., Proclamations, pp. 204-205.]

*By the President of the United States of America:*

**A Proclamation**

Whereas, Under and by virtue of an act of Congress entitled "An act to provide further for the national security and defense by encouraging the production, conserving the supply, and controlling the distribution of food products and fuel," approved by the President on August 10, 1917, it is provided in Section 15, among other things, as follows:

Whenever the President shall find that limitation, regulation, or prohibition of the use of foods, fruits, food materials, or feeds in the production of malt or vinous liquors for beverage purposes, or that reduction of the alcoholic content of any such malt or vinous liquors, is essential, in order to assure an adequate and continuous supply of food, or that the national security and defense will be subserved thereby, he is authorized, from time to time, to prescribe and give public notice of the extent of the limitation, regulation, prohibition, or reduction, so necessitated. Whenever such notice shall have been given and shall remain unrevoked, no person shall, after a reasonable time prescribed in such notice, use any foods, fruits, food materials, or feeds in the production of malt or vinous liquors, or import any such liquors except under license issued by the President and in compliance with rules and regulations determined by him governing the production and importation of such liquors and the alcoholic content thereof.

Now, Therefore, I, Woodrow Wilson, President of the United States of America, by virtue of the powers conferred on me by said act of Congress, do hereby find and determine that it is essential, in order to assure an adequate and continuous supply of food, in order to subserve the national security and defense, and because of the increasing requirements of war industries for the fuel productive capacity of the country, the strain upon transportation to serve such industries, and the shortage of labor caused by the necessity of increasing the armed forces of the United States, that the use of sugar, glucose, corn, rice, or any other foods, fruits, food materials, and feeds in the production of malt liquors, including near beer, for beverage purposes be prohibited. And by this proclamation I prescribe and give public notice that on and after October 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials, or feeds, except malt now already made,



and hops, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol; and on and after December 1, 1918, no person shall use any sugar, glucose, corn, rice, or any other foods, fruits, food materials, or feeds, including malt, in the production of malt liquors, including near beer, for beverage purposes, whether or not such malt liquors contain alcohol.

In Witness Whereof, I have hereunto set my hand and caused the seal of the United States to be affixed.

Done in the District of Columbia, this sixteenth day of September in the year of our Lord one thousand nine hundred and eighteen, and of the independence of the United States of America the one hundred and forty-third.

[SEAL]

WOODROW WILSON

By the President:

Robert Lansing,  
*Secretary of State.*

#### **b. Executive Order with respect to the Foreign Service**

[*Congressional Record*, vol. 67, pt. 10, p. 10992.]

#### **EXECUTIVE ORDER**

The following regulations are hereby prescribed for the guidance of the representatives of the Government of the United States in foreign countries with a view to giving unified direction to their activities in behalf of the promotion and protection of the commercial and other interests of the United States, insuring effective cooperation, and encouraging economy in administration.

Whenever representatives of the Department of State and other departments of the Government of the United States are stationed in the same city in a foreign country they will meet in conference at least fortnightly under such arrangements as may be made by the chief diplomatic officer or, at posts where there is no diplomatic officer, by the ranking consular or other officer.

It shall be the purpose of such conferences to secure a free interchange of all information bearing upon the promotion and protection of American interests.

It shall be the duty of all officers to furnish in the most expeditious manner, without further reference, all economic and trade information requested by the ranking officers in the service of other departments of

the Government assigned to the same territory: *Provided*, That where such compliance would be incompatible with the public interest or where the collection of such information requires research of such exhaustive character that the question of interference with regular duties arises, decision as to compliance shall be referred to the chief diplomatic officer or to his designated representative or, in the absence of such officers, to the supervising consular officer in the said jurisdiction. All failures to provide information requested as hereinbefore set forth shall be reported immediately by cable to the departments having jurisdiction over the officers concerned.

With a view to eliminating unnecessary duplication of work, officers in the same jurisdiction shall exchange at least fortnightly a complete inventory of all economic and trade reports in preparation or in contemplation.

Copies of all economic and trade reports prepared by consular or other foreign representatives shall be filed in the appropriate embassy or legation of the United States or, where no such office exists, in the consulate general and shall be available to the ranking foreign representatives of all departments of the Government. Extra copies shall be supplied upon request by the officer making the report.

The customary channel of communication between consular officers and officers of other departments in the foreign field shall be through the supervising consular general, but in urgent cases or those involving minor transactions such communications may be made direct: *Provided*, That copies of all written communication thereof are simultaneously furnished to the consul general for his information. It shall be the duty of supervising consuls general to expedite intercommunication and exchange of material between the consular service and all other foreign representatives of the United States.

Upon the arrival of a representative of any department of the Government of the United States in any foreign territory in which there is an embassy, legation, or consulate general, for the purpose of special investigation, he shall at once notify the head of the diplomatic mission of his arrival and the purpose of his visit, and it shall be the duty of said officer or of his designated representative, or in the absence of such officer, then the supervising consular officer, to notify, when not incompatible with the public interest, all other representatives of the Government of the United States in that territory of the arrival and the purpose of the visit, and to take such steps as may be appropriate to assist in the accomplishment of the object of the visit without needless duplication of work.

In all cases of collaboration, or where material supplied by one officer is utilized by another, full credit therefor shall be given.

CALVIN COOLIDGE

THE WHITE HOUSE, *April 4, 1924.*

### c. Departmental Order with respect to Neutrality Policy

[*State Department Press Releases*, Feb. 18, 1939, pp. 142-143.]

#### DEPARTMENTAL ORDER

No. 778-A

There is hereby created in the Department of State a Division of Controls.

The duties of this Division shall be as follows:

1. To initiate the policy action of the Department and to act as adviser to the Secretary of State in respect to problems arising from the international traffic in arms, ammunition, and implements of war and other munitions of war, and in respect to other controls established to prevent the involvement of the United States in war or to contribute to the national defense of the United States; to supervise the carrying out of these policies; to collaborate in the initiation of the policy action of the Department; and to act as adviser to the Secretary of State in respect to other problems of American neutrality and in the supervision of the carrying out of these policies.

2. To initiate the policy action of the Department and to act as adviser to the Secretary of State in respect to treaties and international agreements dealing with the international traffic in arms, ammunition, and implements of war and other munitions of war; to prepare drafts of such treaties and international agreements; and to supervise the fulfillment of the international obligations of the United States under such treaties and international agreements.

3. To perform all necessary duties in connection with the administration of the statutes providing for the preservation of American neutrality, for the control of the international traffic in arms, ammunition, and implements of war and other munitions of war, and for other controls established to prevent the involvement of the United States in war or to contribute to the national defense of the United States, in so far as the administration of these statutes is vested in the Secretary of State, and to act for and on behalf of the Secretary of State in the issuance, revocation, and amendment of registrations, certificates, allotments, and licenses provided for by such statutes or by regulations issued thereunder.

4. To assist, or act for and on behalf of, the Secretary of State in the performance of his duties as Chairman and Executive Officer of the National Munitions Control Board.

5. To maintain liaison with other Departments and agencies of the Government in respect to matters within the scope of the duties of the Division.

6. To furnish information to the Department of Justice and to assist that Department as may be required in the prosecution of violations of the treaties and statutes relating to the preservation of American neutrality, to the control of the international traffic in arms, ammunition, and implements of war and other munitions of war, and to other controls established to prevent the involvement of the United States in war or to contribute to the national defense of the United States, the administration of which is vested in the Secretary of State.

7. To perform such other duties as may from time to time be assigned to the Division by the Secretary of State.

The Division shall report through the Counselor.

The symbol designation of the Division shall be Co.

The Office of Arms and Munitions Control is hereby abolished and its staff transferred to the new Division, of which Mr. Joseph C. Green is appointed Chief and Mr. Charles W. Yost Assistant Chief.

This Order shall be effective January 3, 1939.

CORDELL HULL

DEPARTMENT OF STATE, November 22, 1938.

## 56. PURPOSE OF VETO

The veto power is given to the President, subject to certain limitations, but without any qualification as to the conditions or purposes which should govern the President in his use of this power. During the earlier years of our history, it was generally felt that he ought not to pass upon the wisdom of legislation, but should use his veto for the purpose of protecting his own independent position and prerogatives against congressional interference, and probably to secure a more genuine consideration of measures by Congress. Later, however, the Presidents have not hesitated to use the veto in order to express disapproval of the substance of legislation as well as of its constitutionality. These various uses of the veto, as well as the actual method in executive consideration, are indicated below.

### a. View of Hamilton

[*The Federalist*, No. 73.]

The propensity of the legislative department to intrude upon the rights, and to absorb the powers, of the other departments, has been

already suggested and repeated; the insufficiency of a mere parchment delineation of the boundaries of each, has also been remarked upon; and the necessity of furnishing each with constitutional arms for its own defence, has been inferred and proved. From these clear and indubitable principles results the propriety of a negative, either absolute or qualified, in the executive, upon the acts of the legislative branches. Without the one or the other, the former would be absolutely unable to defend himself against the depredations of the latter. He might gradually be stripped of his authorities by successive resolutions or annihilated by a single vote. And in the one mode or the other the legislative and executive powers might speedily come to be blended in the same hands. If even no propensity had ever discovered itself in the legislative body to invade the rights of the executive, the rules of just reasoning and theoretic propriety would of themselves teach us that the one ought not to be left at the mercy of the other, but ought to possess a constitutional and effectual power of self-defence.

But the power in question has a further use. It not only serves as a shield to the executive, but it furnishes an additional security against the enactment of improper laws. It establishes a salutary check upon the legislative body, calculated to guard the community against the effects of faction, precipitancy, or of any impulse unfriendly to the public good which may happen to influence a majority of that body.

The propriety of a negative has upon some occasions been combated by an observation that it was not to be presumed a single man would possess more virtue and wisdom than a number of men; and that unless this presumption should be entertained it would be improper to give the executive magistrate any species of control over the legislative body.

But this observation, when examined, will appear rather specious than solid. The propriety of the thing does not turn upon the supposition of superior wisdom or virtue in the executive, but upon the supposition that the legislative will not be infallible; that the love of power may sometimes betray it into a disposition to encroach upon the rights of the other members of the government; that a spirit of faction may sometimes pervert its deliberation; that impressions of the moment may sometimes hurry it into measures which itself, on maturer reflection, would condemn. The primary inducement to conferring the power in question upon the executive is to enable him to defend himself; the secondary one is to increase the chances in favor of the community against the passing of bad laws through haste, inadvertence, or design. The oftener a measure is brought under examination, the greater the diversity in the situations of those who are to examine it, the less must

be the danger of those errors which flow from want of due deliberation or of those missteps which proceed from the contagion of some common passion or interest. It is far less probable that culpable views of any kind should infect all the parts of the government at the same moment and in relation to the same object, than that they should by turns govern and mislead every one of them.

It may, perhaps, be said that the power of preventing bad laws includes that of preventing good ones, and may be used to the one purpose as well as to the other. But this objection will have little weight with those who can properly estimate the mischiefs of that inconstancy and mutability in the laws which form the greatest blemish in the character and genius of our governments. They will consider every institution calculated to restrain the excess of law-making, and to keep things in the same state in which they may happen to be at any given period, as much more likely to do good than harm; because it is favorable to greater stability in the system of legislation. The injury which may possibly be done by defeating a few good laws, will be amply compensated by the advantage of preventing a number of bad ones.

Nor is this all. The superior weight and influence of the legislative body in a free government, and the hazard to the executive in a trial of strength with that body, afford a satisfactory security that the negative would generally be employed with great caution; and there would oftener be room for a charge of timidity than of rashness in the exercise of it. A king of Great Britain, with all his train of sovereign attributes and with all the influence he draws from a thousand sources, would, at this day, hesitate to put a negative upon the joint resolutions of the two Houses of Parliament. He would not fail to exert the utmost resources of that influence to strangle a measure disagreeable to him, in its progress to the throne, to avoid being reduced to the dilemma of permitting it to take effect or of risking the displeasure of the nation by an opposition to the sense of the legislative body. Nor is it probable that he would ultimately venture to exert his prerogatives, but in a case of manifest propriety or extreme necessity. All well-informed men in that kingdom will accede to the justness of this remark. A very considerable period has elapsed since the negative of the Crown has been exercised.

If a magistrate so powerful and so well fortified as a British monarch would have scruples about the exercise of the power under consideration, how much greater caution may be reasonably expected in a President of the United States, clothed for the short period of four years with the executive authority of a government wholly and purely republican?



It is evident that there would be greater danger of his not using his power when necessary than of his using it too often or too much. An argument, indeed, against its expediency has been drawn from this very source. It has been represented, on this account, as a power odious in appearance, useless in practice. But it will not follow that because it might be rarely exercised, it would never be exercised. In the case for which it is chiefly designed, that of an immediate attack upon the constitutional rights of the executive, or in a case in which the public good was evidently and palpably sacrificed, a man of tolerable firmness would avail himself of his constitutional means of defence, and would listen to the admonitions of duty and responsibility. In the former supposition, his fortitude would be stimulated by his immediate interest in the power of his office; in the latter, by the probability of the sanction of his constituents; who, though they would naturally incline to the legislative body in a doubtful case, would hardly suffer their partiality to delude them in a very plain case. I speak now with an eye to a magistrate possessing only a common share of firmness. There are men who, under any circumstances, will have the courage to do their duty at every hazard.

### **b. President Wilson's Veto of Budget Bill**

[*Congressional Record*, vol. 59, pt. 8, pp. 8609-8610.]

*To the House of Representatives:*

I am returning without my signature H. R. 9783, "An act to provide a national budget system, an independent audit of Government accounts, and for other purposes." I do this with the greatest regret. I am in entire sympathy with the objects of this bill and would gladly approve it but for the fact that I regard one of the provisions contained in section 303 as unconstitutional. This is the provision to the effect that the comptroller general and the assistant comptroller general, who are to be appointed by the President with the advice and consent of the Senate, may be removed at any time by a concurrent resolution of Congress after notice and hearing, when, in their judgment, the comptroller general or assistant comptroller general is incapacitated or inefficient, or has been guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. The effect of this is to prevent the removal of these officers for any cause except either by impeachment or a concurrent resolution of Congress. It has, I think, always been the accepted construction of the Constitution that the power

to appoint officers of this kind carries with it, as an incident, the power to remove. I am convinced that the Congress is without constitutional power to limit the appointing power and its incident, the power of removal derived from the Constitution.

The section referred to not only forbids the Executive to remove these officers but undertakes to empower the Congress by a concurrent resolution to remove an officer appointed by the President with the advice and consent of the Senate. I can find in the Constitution no warrant for the exercise of this power by the Congress. There is certainly no express authority conferred, and I am unable to see that authority for the exercise of this power is implied in any express grant of power. On the contrary, I think its exercise is clearly negated by section 2 of Article II. That section, after providing that certain enumerated officers and all officers whose appointments are not otherwise provided for shall be appointed by the President with the advice and consent of the Senate, provides that the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of department. It would have been within the constitutional power of the Congress, in creating these offices, to have vested the power of appointment in the President alone, in the President with the advice and consent of the Senate, or even in the head of a department. Regarding as I do the power of removal from office as an essential incident to the appointing power, I can not escape the conclusion that the vesting of this power of removal in the Congress is unconstitutional and therefore I am unable to approve the bill.

I am returning the bill at the earliest possible moment with the hope that the Congress may find time before adjournment to remedy this defect.

WOODROW WILSON

The White House, June 4, 1920.

### **c. President Wilson's Veto of Immigration Bill**

[*Congressional Record*, vol. 52, pt. 3, pp. 2481-2482.]

The White House, January 28, 1915.

*To the House of Representatives:*

It is with unaffected regret that I find myself constrained by clear conviction to return this bill (H. R. 6060, "An act to regulate the immigration of aliens to and the residence of aliens in the United States") without my signature. Not only do I feel it to be a very serious matter to exercise the power of veto in any case, because it involves opposing

the single judgment of the President to the judgment of a majority of both the Houses of the Congress, a step which no man who realizes his own liability to error can take without great hesitation, but also because this particular bill is in so many important respects admirable, well conceived, and desirable. Its enactment into law would undoubtedly enhance the efficiency and improve the methods of handling the important branch of the public service to which it relates. But candor and a sense of duty with regard to the responsibility so clearly imposed upon me by the Constitution in matters of legislation leave me no choice but to dissent.

In two particulars of vital consequence this bill embodies a radical departure from the traditional and long-established policy of this country, a policy in which our people have conceived the very character of their Government to be expressed, the very mission and spirit of the Nation in respect of its relations to the peoples of the world outside their borders. It seeks to all but close entirely the gates of asylum which have always been open to those who could find nowhere else the right and opportunity of constitutional agitation for what they conceived to be the natural and inalienable rights of men; and it excludes those to whom the opportunities of elementary education have been denied, without regard to their character, their purposes, or their natural capacity.

Restrictions like these, adopted earlier in our history as a Nation, would very materially have altered the course and cooled the humane ardors of our politics. The right of political asylum has brought to this country many a man of noble character and elevated purpose who was marked as an outlaw in his own less fortunate land, and who has yet become an ornament to our citizenship and to our public councils. The children and the compatriots of these illustrious Americans must stand amazed to see the representatives of their Nation now resolved, in the fullness of our national strength and at the maturity of our great institutions, to risk turning such men back from our shores without test of quality or purpose. It is difficult for me to believe that the full effect of this feature of the bill was realized when it was framed and adopted, and it is impossible for me to assent to it in the form in which it is here cast.

The literacy test and the tests and restrictions which accompany it constitute an even more radical change in the policy of the Nation. Hitherto we have generously kept our doors open to all who were not unfitted by reason of disease or incapacity for self-support or such personal records and antecedents as were likely to make them a menace

to our peace and order or to the wholesome and essential relationships of life. In this bill it is proposed to turn away from tests of character and of quality and impose tests which exclude and restrict; for the new tests here embodied are not tests of quality or of character or of personal fitness, but tests of opportunity. Those who come seeking opportunity are not to be admitted unless they have already had one of the chief of the opportunities they seek, the opportunity of education. The object of such provisions is restriction, not selection.

If the people of this country have made up their minds to limit the number of immigrants by arbitrary tests and so reverse the policy of all the generations of Americans that have gone before them, it is their right to do so. I am their servant and have no license to stand in their way. But I do not believe that they have. I respectfully submit that no one can quote their mandate to that effect. Has any political party ever avowed a policy of restriction in this fundamental matter, gone to the country on it, and been commissioned to control its legislation? Does this bill rest upon the conscious and universal assent and desire of the American people? I doubt it. It is because I doubt it that I make bold to dissent from it. I am willing to abide by the verdict, but not until it has been rendered. Let the platforms of parties speak out upon this policy and the people pronounce their wish. The matter is too fundamental to be settled otherwise.

I have no pride of opinion in this question. I am not foolish enough to profess to know the wishes and ideals of America better than the body of her chosen representatives know them. I only want instruction direct from those whose fortunes, with ours and all men's, are involved.

WOODROW WILSON

## 57. ITEM VETO

In most of the states the governor has the power to veto individual items in an appropriation bill without vetoing the entire bill, and this gives him a degree of control over expenditures which the President does not have. The lack of the item veto leads particularly to the practice on the part of Congress of attaching so-called "riders" to the large appropriation bills and in that way often forcing the President to accept measures or items which he could more easily veto if separately enacted. Numerous proposals have been made throughout our history to give the President the item veto, formal recommendations or protests to this effect being made to Congress by Presidents Grant, Hayes, and Arthur. President Roosevelt, in his budget message of January 5, 1938, renewed this recommendation, and the House of Representatives promptly included in the Independent Offices Appropriation Bill a provision which authorized a form of item veto. There being considerable doubt whether this power could constitutionally be granted by legis-

lative act, the provision was eliminated by the Senate, and the President is still (1940) without the item veto.

### a. Protest against Riders

[Veto Message of President Hayes, Apr. 29, 1879. Richardson, *Messages and Papers of the Presidents*, vol. VII, pp. 523-532.]

EXECUTIVE MANSION, *April 29, 1879.*

*To the House of Representatives:*

I have maturely considered the important questions presented by the bill entitled "An act making appropriations for the support of the Army for the fiscal year ending June 30, 1880, and for other purposes," and I now return it to the House of Representatives, in which it originated, with my objections to its approval.

The bill provides in the usual form for the appropriations required for the support of the Army during the next fiscal year. If it contained no other provisions, it would receive my prompt approval. It includes, however, further legislation, which, attached, as it is, to appropriations which are requisite for the efficient performance of some of the most necessary duties of the Government, involves questions of the gravest character. The sixth section of the bill is amendatory of the statute now in force in regard to the authority of persons in the civil, military, and naval service of the United States "at the place where any general or special election is held in any State." [Then follows an extended argument against this amendment.] . . . Believing that section 6 of the bill before me will weaken, if it does not altogether take away, the power of the National Government to protect the Federal elections by the civil authorities, I am forced to the conclusion that it ought not to receive my approval.

This section is, however, not presented to me as a separate and independent measure, but is, as has been stated, attached to the bill making the usual annual appropriations for the support of the Army. It makes a vital change in the election laws of the country, which is in no way connected with the use of the Army. It prohibits, under heavy penalties, any person engaged in the civil service of the United States from having any force at the place of any election, prepared to preserve order, to make arrests, to keep the peace, or in any manner to enforce the laws. This is altogether foreign to the purpose of an Army appropriation bill. The practice of tacking to appropriation bills measures not pertinent to such bills did not prevail until more than forty years after the adoption of the Constitution. It has become a common practice. All parties

when in power have adopted it. Many abuses and great waste of public money have in this way crept into appropriation bills. The public opinion of the country is against it. The States which have recently adopted constitutions have generally provided a remedy for the evil by enacting that no law shall contain more than one subject, which shall be plainly expressed in its title. The constitutions of more than half of the States contain substantially this provision. The public welfare will be promoted in many ways by a return to the early practice of the Government and to the true principle of legislation, which requires that every measure shall stand or fall according to its own merits. If it were understood that to attach to an appropriation bill a measure irrelevant to the general object of the bill would imperil and probably prevent its final passage and approval, a valuable reform in the parliamentary practice of Congress would be accomplished. The best justification that has been offered for attaching irrelevant riders to appropriation bills is that it is done for convenience' sake, to facilitate the passage of measures which are deemed expedient by all the branches of Government which participate in legislation. It can not be claimed that there is any such reason for attaching this amendment of the election laws to the Army appropriation bill. The history of the measure contradicts this assumption. [Then follows a detailed history of the measure.]

. . . It is clearly the constitutional duty of the President to exercise his discretion and judgment upon all bills presented to him without constraint or duress from any other branch of the Government. To say that a majority of either or both of the Houses of Congress may insist upon the approval of a bill under the penalty of stopping all of the operations of the Government for want of the necessary supplies is to deny to the Executive that share of the legislative power which is plainly conferred by the second section of the seventh article of the Constitution. It strikes from the Constitution the qualified negative of the President. . . .

Believing that this bill is a dangerous violation of the spirit and meaning of the Constitution, I am compelled to return it to the House in which it originated without my approval. The qualified negative with which the Constitution invests the President is a trust that involves a duty which he can not decline to perform. With a firm and conscientious purpose to do what I can to preserve unimpaired the constitutional powers and equal independence, not merely of the Executive, but of every branch of the Government, which will be imperiled by the adoption of the principle of this bill, I desire earnestly to urge upon the



House of Representatives a return to the wise and wholesome usage of the earlier days of the Republic, which excluded from appropriation bills all irrelevant legislation. By this course you will inaugurate an important reform in the method of Congressional legislation; your action will be in harmony with the fundamental principles of the Constitution and the patriotic sentiment of nationality which is their firm support, and you will restore to the country that feeling of confidence and security and the repose which are so essential to the prosperity of all of our fellow-citizens.

RUTHERFORD B. HAYES

### b. Vandenberg-Roosevelt Correspondence

[Text in *Congressional Record*, vol. 83, pt. 1, pp. 42-43 (Jan. 5, 1938).]

CORRESPONDENCE ON THE SUBJECT OF THE "ITEM VETO" BETWEEN PRESIDENT ROOSEVELT AND SENATOR VANDENBERG, RELEASED FOR PUBLICATION AT THE SUGGESTION OF THE PRESIDENT<sup>1</sup>

#### EXHIBIT A

(Letter from Senator Vandenberg to President Roosevelt)

August 19, 1937.

HON. FRANKLIN D. ROOSEVELT,

*President of the United States, Washington, D. C.*

*My Dear Mr. President:* I want you to know that I completely agree with your criticism of legislative riders on tax and appropriation bills. Regardless of the merits or demerits of any such riders—and I do not enter that phase of the discussion at the moment—the manifest fact remains that this practice robs the Executive of legitimate and essential freedom of action in dealing with legislation.

It seems equally obvious to me this essential freedom of action is lacking in respect to appropriation bills if the Executive must accept or reject an appropriation bill in its entirety. I do not see how there can be effective Executive action upon an appropriation bill unless it can be considered by the President in its separate factors.

These observations lead me respectfully to suggest the advisability of studying an amendment to the Constitution to provide for the so-called item veto in respect to appropriation and tax bills. The item veto has been discussed in Congress off and on for nearly 50 years. Numerous

<sup>1</sup> Other letters are summarized in the press on same date.

such constitutional amendments have been offered. I presented an item-veto amendment in the last and present sessions of Congress.

I should be very much interested in knowing your reaction to an earnest effort to write an item-veto amendment into the Constitution.

With sentiments of great respect, I beg to remain, with warm personal regards and best wishes,

Cordially and faithfully,

Senator A. H. VANDENBERG

EXHIBIT B

(Letter from President Roosevelt to Senator Vandenberg)

THE WHITE HOUSE,

*En Route to Wendover, Wyo., September 24, 1937.*

HON. ARTHUR H. VANDENBERG,

*United States Senator, Grand Rapids, Mich.*

*My Dear Senator Vandenberg:* Your letter of August 19 in regard to a constitutional amendment authorizing the Executive to veto items in general appropriation and tax bills interested me greatly. It is true that the item veto would spare the Executive the occasional embarrassment of signing a general appropriation or tax bill containing undesirable features in order to have necessary legislation. The evil of intermingling wise and unwise expenditures or tax provisions—like that of “riders”—is one, it seems to me, with which the resources of Congress are adequate to deal. If there were a public opinion condemning such legislation strong enough to carry a constitutional amendment, it ought to be reflected in the action of Congress.

I understand that 39 States have had satisfactory experience with the item veto in general appropriation acts. During my 4 years as Governor of New York I came to the conclusion that the right to veto items in general appropriation acts met with general favor on the part of the legislature and of the public.

It seems to me, therefore, that it is appropriate at least to discuss the subject.

I am grateful to you for writing me in regard to the proposal to amend the Constitution and appreciate your expression of approval as to my action in calling attention to the unfairness of shackling the Executive in acting on legislation.

Very sincerely yours,

FRANKLIN D. ROOSEVELT

## 58. THREAT OF VETO

The effectiveness of the veto power cannot be completely measured by the number of actual vetoes sustained or overridden, since the President, if he objects to certain provisions in a bill before Congress, may threaten a veto and thus persuade or force Congress to reshape the bill to meet his objections. This threat has been used many times, President F. D. Roosevelt in that way inducing the Senate Committee on Finance to vote down certain import duties that seemed to him to repudiate the trade agreements policy.

[Letter of President Roosevelt to Senator Harrison, Chairman of the Senate Committee on Finance, Mar. 29, 1939. Text in *State Department Press Releases*, Apr. 1, 1939, pp. 255-257.]

*My Dear Senator Harrison:*

I feel impelled to write to you in regard to certain amendments now under consideration before your committee which would amend H. R. 3790, a bill which deals with the important and entirely separate subject of reciprocal taxation of incomes of federal and state employees. These amendments would raise to new heights the taxes—in effect tariffs—on many imported fats and oils. I am addressing this letter to you because the amendments have been referred to the committee of which you are the chairman.

I, of course, know that the senators who introduced these amendments acted in good faith. But there should be no illusion about the vital importance of the issue the amendments present. We are not dealing here with bona fide excise taxes for revenue purposes, but with what in purpose and effect are tariffs of the embargo variety. The amendments run directly counter to the provisions of reciprocal trade agreements already in force with such important countries as the United Kingdom, Canada, the Netherlands and Brazil. If enacted, they would destroy or at the very least seriously impair these agreements under which we have obtained concessions benefiting more than a quarter of a billion dollars worth of American exports of agricultural products alone and they would hamper our efforts to conclude additional trade agreements in the interest of American agriculture and industry. The issue is clear. It is whether to sustain our present policy or to return now, or during the pendency of the Trade Agreements Act, to the embargo tariff policy exemplified by the disastrous Hawley-Smoot Tariff Act. [Then follows a long and detailed argument against the amendments.] . . .

Such tariff or tax increases, when proposed, obviously should be treated as amendments of existing tariff legislation and should receive the kind of consideration that would be given to specific tariff legislation. This would include study of the proposals on their own merits by experts

of the Tariff Commission and other agencies of the Government and by the appropriate committees of the Congress, as elements in the general tariff structure and in relation to the country's commercial policy as a whole.

The inclusion of tariff revisions as parts of or as riders on other legislation creates a difficult situation for the Congress and a much more difficult situation for the Executive. It imposes upon the President the necessity of accepting tariff rate revisions which he may consider contrary to the public interest in order to preserve the main legislation. His only alternative is to veto the whole act and thereby delay and perhaps endanger the desirable and major portions of the Act. In this case the adoption of the amendments would make it my clear duty to veto H. R. 3790 however meritorious the bill may be.

Let me repeat, the trade agreements program is an essential part of our general program for economic recovery in this country. It is also, particularly at this critical stage of world affairs, a vital part of our foreign policy. Attacks on the trade agreements program such as that represented by this new drive for embargo tariffs on fats and oils are, therefore, attacks on our efforts to attain full prosperity at home and to promote economic disarmament and peaceful relations throughout the world.

Very sincerely yours,

FRANKLIN D. ROOSEVELT

## 59. ADMINISTRATION MEASURES

Although the President and his Cabinet do not have seats in Congress or the right formally to introduce bills, as do the ministers in countries under the parliamentary system, yet there are several means by which the Executive may indicate its views and influence Congress in the enactment of legislation. A practice of growing importance in this connection is the preparation of bills by the President himself or by his principal administrative officers, on matters relating to the work of their departments. These measures, having the full weight of the Administration behind them, are called administration measures. They will readily be introduced by some one of the President's supporters and will usually be given priority of consideration. The practice has, indeed, become so common, and has been so successful in giving the Executive a hand in legislation, as to cause some misgivings on the part of members of Congress, who may look upon it as an encroachment upon their prerogatives.

[*Congressional Record*, vol. 42, pt. 1, pp. 268, 294-302 (Dec. 11, 12, 1907).]

MR. HEYBURN. Mr. President, if I may interrupt the proceedings at this time and have unanimous consent, I desire to call the attention of

the Senate to some matters that appear upon the face of this morning's *Record* with reference to the introduction of bills, which, so far as I am advised, are of rather an unusual character.

I would call the attention of the Senate to the paragraph in this morning's *Record*, on page 1, which reads as follows:

"The Vice-President laid before the Senate a communication from the Secretary of the Interior, transmitting a draft of a bill to authorize the leasing of irrigable allotted lands, the lands reserved for the use of the Indians in common, for agricultural purposes, etc., which, with the accompanying paper, was referred to the Committee on Indian Affairs and ordered to be printed."

I am not advised of any rule of the Senate or of any law under which the Secretary of the Interior may introduce a bill into the Senate of the United States and have it referred, read, or printed.

I find that on the first page of this morning's *Record* there are quite a large number of such instances. I should like to inquire by what authority the head of a Department of the executive branch of the Government may introduce, either directly or indirectly, into this body a proposed measure of legislation of any kind, whether it be a resolution or a bill. It seems to me opportune at this time to interpose the inquiry, that I may be advised as to the rule and the authority for such a proceeding.

THE VICE-PRESIDENT. The Chair understands that according to the practice which has prevailed heretofore such matters are in the nature of communications from the heads of Departments; that they go to the committee having jurisdiction over the subject to which they relate simply as matters of information, and the committee report them back in the shape of original bills if they see fit.

MR. HEYBURN. Mr. President, I understand that under the rules of the Senate it is the privilege of any member at any time to object to the introduction of a bill. Bills are introduced only with the consent, or by the permission, of this body, and I can see some danger in any rule or practice which permits a Department to introduce a bill in this method, which deprives any member of the body of an opportunity to object to the bill being read a first or second time. These bills go to the appropriate committee; they go to the committee indirectly from the executive branch of the Government, and I think it will appear that on some occasions in the past they have been reported back in substantially the same shape that they were presented to the body. I think that all bills which are referred which go to a committee should go there under the rules of the Senate. I, for one, desire to enter a protest against thus indirectly

admitting anyone not a member of this body to the privilege of introducing bills and having them referred to committees.

MR. CARTER. Mr. President, the suggestion of the Senator from Idaho as to the utter impropriety of any attempt on the part of anyone to introduce a bill into the Senate save and except a Senator is very appropriate as a criticism; but I doubt its application to the case he has presented or to any similar case.

It is customary for the head of a Department to send communications to the Senate on any subject within the jurisdiction of the Department. Such communications may suggest the need for remedial legislation as disclosed in the ordinary course of administration. Such suggestion may be made frequently in more cogent and intelligent form by presenting not a bill, but the thought crystallized into a proposed bill. The bill is not read the first and second times in the Chamber, nor is it introduced as a bill in the Senate. It accompanies the communication from the head of the Department in the way of explanatory matter, showing in terse form just how the thought sought to be incorporated into law could be, according to the Department's idea, clearly expressed. It is frequently easier to express in the form of proposed legislation the object sought to be accomplished than it is to attempt to do the same thing by the extensive use of language in a descriptive way. . . .

MR. LODGE. Mr. President, I think I was correct in saying that the habit has insensibly grown up, and that it also is spreading, on the part of heads of Departments to make voluntary communications or to volunteer communications directly to the Senate or to the House. I do not think it can be controverted that strictly those communications can only come through transmission by the President, and I think it is always well to be a little strict in the observance of the law and not to allow such irregular customs, even if apparently harmless, to grow up.

But certainly, Mr. President, the practice of submitting bills from the Departments without request to the two Houses is something quite recent, unless my memory is all astray, and that is a very much more important matter. . . .

I think, Mr. President, it is just as well to put a stop to this submission of drafts of bills to Congress by subordinate executive officers or by heads of Departments unless they are thereto requested by one of the two Houses. I do not think that volunteering bills from the Executive Department is the proper method.

Of course, under the English system, the bills are prepared by the executive government, which is a committee in fact of the two Houses,



and they prepare their own measures and introduce them. But here the Executive Department is distinct, and unless we ask for drafts or bills for our own convenience and for the promotion of good legislation, it seems to me that it is irregular, and unwisely irregular, to fall into the practice of having officers of the Executive Department present bills to Congress in this way.

Half a dozen came in the other day. They were referred to committees without taking any readings. They were referred to committees for consideration. Those bills have no Calendar number. They do not take the ordinary course of any other bills. I think it is an irregular way, both under the rules and under the statute.

I do not want to cut off the advantage that we have in getting officers of the Departments to draw proper bills for us. That is a duty which I hope they will always perform, on the request of the Houses. But I do not think that they ought to submit bills unasked for, which shall go in this irregular way to committees for consideration. If the head of a Department has legislation in which he is interested and presents it to the chairman of a committee or some other Senator, and he sees fit to introduce it, that of course is perfectly proper. The bill takes the usual course. But this is irregular, just as is this method of submitting reports. I do not care how long the custom has lasted, it is an irregularity which has grown up. If we are to have information volunteered from the Departments, let it come through the President of the United States, and any other information we want from the Departments we can ask for. . . .

MR. HEYBURN. . . . Now, it is no part of the duty or the province of any Department of the Government to participate in the legislation or in the legislative processes of this body. We are quite capable, in our own judgment and in that of the country, of framing and considering and enacting necessary legislation to meet every requirement, every contingency, and I think the sooner we adopt a rule that shall divorce the executive branch of the Government entirely from participation in the legislation of the country the more nearly we will have planted ourselves upon the original scheme of our Government, which wisely intended that there should be no merging or overlapping in the performance of those duties.

The Executive Departments have only the powers we give them. These Departments of the Government have no original powers resting on the organic law of the land. They have such powers and such rights and such duties as we confer upon them. They are there to execute the will of the people as expressed by Congress, which is the only tribunal under the Constitution that speaks the will of the people. If they con-

fine themselves to that duty they will accomplish most fully the purpose for which the Departments were organized.

## 60. WHITE HOUSE ORGANIZATION

With the tremendous expansion of governmental activity has come an increasingly heavy burden on the President. At first a small staff of clerks was assigned to him from other departments, and it was not until 1855 that Congress created the office of private secretary to the President, whatever secretaries the President had before that time being paid out of his own pocket. During President McKinley's administration the office of Secretary to the President was given additional rank and dignity, and from that time larger and larger staffs were provided for the White House, with increasingly generous appropriations. During the administration of Franklin D. Roosevelt, the White House establishment was also considerably reorganized and in general made more efficient.

### a. Proposals of the President's Committee

[*Report of the President's Committee on Administrative Management*  
(Jan., 1937), pp. 5-6.]

#### I. THE WHITE HOUSE STAFF

In this broad program of administrative reorganization the White House itself is involved. The President needs help. His immediate staff assistance is entirely inadequate. He should be given a small number of executive assistants who would be his direct aides in dealing with the managerial agencies and administrative departments of the Government. These assistants, probably not exceeding six in number, would be in addition to his present secretaries, who deal with the public, with the Congress, and with the press and the radio. These aides would have no power to make decisions or issue instructions in their own right. They would not be interposed between the President and the heads of his departments. They would not be assistant presidents in any sense. Their function would be, when any matter was presented to the President for action affecting any part of the administrative work of the Government, to assist him in obtaining quickly and without delay all pertinent information possessed by any of the executive departments so as to guide him in making his responsible decisions; and then when decisions have been made, to assist him in seeing to it that every administrative department and agency affected is promptly informed. Their effectiveness in assisting the President will, we think, be directly proportional to their ability to discharge their functions with restraint.

They would remain in the background, issue no orders, make no decisions, emit no public statements. Men for these positions should be carefully chosen by the President from within and without the Government. They should be men in whom the President has personal confidence and whose character and attitude is such that they would not attempt to exercise power on their own account. They should be possessed of high competence, great physical vigor, and a passion for anonymity. They should be installed in the White House itself, directly accessible to the President. In the selection of these aides the President should be free to call on departments from time to time for the assignment of persons who, after a tour of duty as his aides, might be restored to their old positions.

This recommendation arises from the growing complexity and magnitude of the work of the President's office. Special assistance is needed to insure that all matters coming to the attention of the President have been examined from the over-all managerial point of view, as well as from all standpoints that would bear on policy and operation. It also would facilitate the flow upward to the President of information upon which he is to base his decisions and the flow downward from the President of the decisions once taken for execution by the department or departments affected. Thus such a staff would not only aid the President but would also be of great assistance to the several executive departments and to the managerial agencies in simplifying executive contacts, clearance, and guidance.

The President should also have at his command a contingent fund to enable him to bring in from time to time particular persons possessed of particular competency for a particular purpose and whose services he might usefully employ for short periods of time.

The President in his regular office staff should be given a greater number of positions so that he will not be compelled, as he has been compelled in the past, to use for his own necessary work persons carried on the pay rolls of other departments.

If the President be thus equipped he will have but the ordinary assistance that any executive of a large establishment is afforded as a matter of course.

In addition to this assistance in his own office the President must be given direct control over and be charged with immediate responsibility for the great managerial functions of the Government which affect all of the administrative departments, as is outlined in the following sections of this report. These functions are personnel management, fiscal and organizational management, and planning management. Within these

three groups may be comprehended all of the essential elements of business management.

The development of administrative management in the Federal Government requires the improvement of the administration of these managerial activities, not only by the central agencies in charge, but also by the departments and bureaus. The central agencies need to be strengthened and developed as managerial arms of the Chief Executive, better equipped to perform their central responsibilities and to provide the necessary leadership in bringing about improved practices throughout the Government.

The three managerial agencies, the Civil Service Administration, the Bureau of the Budget, and the National Resources Board should be a part and parcel of the Executive Office. Thus the President would have reporting to him directly the three managerial institutions whose work and activities would affect all of the administrative departments.

The budgets for the managerial agencies should be submitted to the Congress by the President as a part of the budget for the Executive Office. This would distinguish these agencies from the operating administrative departments of the Government, which should report to the President through the heads of departments who collectively compose his Cabinet. Such an arrangement would materially aid the President in his work of supervising the administrative agencies and would enable the Congress and the people to hold him to strict accountability for their conduct.

The following three sections deal with these managerial functions, namely, personnel management, fiscal management, and planning management, and contain recommendations for their development.

#### **b. White House Reorganization**

[Executive Order of Sept. 8, 1939. *Federal Register*, vol. 4, pp. 3864-3865 (Sept. 12, 1939).]

#### **EXECUTIVE ORDER**

##### **ESTABLISHING THE DIVISIONS OF THE EXECUTIVE OFFICE OF THE PRESIDENT AND DEFINING THEIR FUNCTIONS AND DUTIES**

By virtue of the authority vested in me by the Constitution and Statutes, and in order to effectuate the purposes of the Reorganization Act of 1939, Public No. 19, Seventy-sixth Congress, approved April 3, 1939, and of Reorganization Plans Nos. I and II submitted to the Congress by the President and made effective as of July 1, 1939 by Public Resolution No. 2, Seventy-sixth Congress, approved June 7, 1939, by

organizing the Executive Office of the President with functions and duties so prescribed and responsibilities so fixed that the President will have adequate machinery for the administrative management of the Executive branch of the Government, it is hereby ordered as follows:

## I

There shall be within the Executive Office of the President the following principal divisions, namely: (1) The White House Office, (2) the Bureau of the Budget, (3) the National Resources Planning Board, (4) the Liaison Office for Personnel Management, (5) the Office of Government Reports, and (6) in the event of a national emergency, or threat of a national emergency, such office for emergency management as the President shall determine.

## II

The functions and duties of the divisions of the Executive Office of the President are hereby defined as follows:

1. *The White House Office.* In general, to serve the President in an intimate capacity in the performance of the many detailed activities incident to his immediate office. To that end, The White House Office shall be composed of the following principal subdivisions, with particular functions and duties as indicated:

(a) *The Secretaries to the President.* To facilitate and maintain quick and easy communication with the Congress, the individual members of the Congress, the heads of executive departments and agencies, the press, the radio, and the general public.

(b) *The Executive Clerk.* To provide for the orderly handling of documents and correspondence within The White House Office, and to organize and supervise all clerical services and procedure relating thereto.

(c) *The Administrative Assistants to the President.* To assist the President in such matters as he may direct, and at the specific request of the President, to get information and to condense and summarize it for his use. These Administrative Assistants shall be personal aides to the President and shall have no authority over anyone in any department or agency, including the Executive Office of the President, other than the personnel assigned to their immediate office. In no event shall the Administrative Assistants be interposed between the President and the head of any department or agency, or between the President and any one of the divisions in the Executive Office of the President.

2. *The Bureau of the Budget.* (a) To assist the President in the preparation of the Budget and the formulation of the fiscal program of the Government.

(b) To supervise and control the administration of the Budget.

(c) To conduct research in the development of improved plans of administrative management, and to advise the executive departments and agencies of the Government with respect to improved administrative organization and practice.

(d) To aid the President to bring about more efficient and economical conduct of Government service.

(e) To assist the President by clearing and coordinating departmental advice on proposed legislation and by making recommendations as to Presidential action on legislative enactments, in accordance with past practice.

(f) To assist in the consideration and clearance and, where necessary, in the preparation of proposed Executive orders and proclamations, in accordance with the provisions of Executive Order No. 7298 of February 18, 1936.

(g) To plan and promote the improvement, development, and coordination of Federal and other statistical services.

(h) To keep the President informed of the progress of activities by agencies of the Government with respect to work proposed, work actually initiated, and work completed, together with the relative timing of work between the several agencies of the Government; all to the end that the work programs of the several agencies of the Executive branch of the Government may be coordinated and that the monies appropriated by the Congress may be expended in the most economical manner possible with the least possible overlapping and duplication of effort.

3. *The National Resources Planning Board.* (a) To survey, collect data on, and analyze problems pertaining to national resources, both natural and human, and to recommend to the President and the Congress long-time plans and programs for the wise use and fullest development of such resources.

(b) To consult with Federal, regional, state, local, and private agencies in developing orderly programs of public works and to list for the President and the Congress all proposed public works in the order of their relative importance with respect to (1) the greatest good to the greatest number of people, (2) the emergency necessities of the Nation, and (3) the social, economic, and cultural advancement of the people of the United States.

(c) To inform the President of the general trend of economic conditions and to recommend measures leading to their improvement or stabilization.



(d) To act as a clearing house and means of coordination for planning activities, linking together various levels and fields of planning.

4. *The Liaison Office for Personnel Management.* In accordance with the statement of purpose made in the Message to Congress of April 25, 1939, accompanying Reorganization Plan No. I, one of the Administrative Assistants to the President, authorized in the Reorganization Act of 1939, shall be designated by the President as Liaison Officer for Personnel Management and shall be in charge of the Liaison Office for Personnel Management. The functions of this office shall be:

(a) To assist the President in the better execution of the duties imposed upon him by the Provisions of the Constitution and the laws with respect to personnel management, especially the Civil Service Act of 1883, as amended, and the rules promulgated by the President under authority of that Act.

(b) To assist the President in maintaining closer contact with all agencies dealing with personnel matters insofar as they affect or tend to determine the personnel management policies of the Executive branch of the Government.

5. *The Office of Government Reports.* (a) To provide a central clearing house through which individual citizens, organizations of citizens, state or local governmental bodies, and, where appropriate, agencies of the Federal Government, may transmit inquiries and complaints and receive advice and information.

(b) To assist the President in dealing with special problems requiring the clearance of information between the Federal Government and state and local governments and private institutions.

(c) To collect and distribute information concerning the purposes and activities of executive departments and agencies for the use of the Congress, administrative officials, and the public.

(d) To keep the President currently informed of the opinions, desires, and complaints of citizens and groups of citizens and of state and local governments with respect to the work of Federal agencies.

(e) To report to the President on the basis of the information it has obtained possible ways and means for reducing the cost of the operation of the Government.

### III

The Bureau of the Budget, the National Resources Planning Board, and the Liaison Office for Personnel Management shall constitute the three principal management arms of the Government for the (1) preparation and administration of the Budget and improvement of admin-

istrative management and organization, (2) planning for conservation and utilization of the resources of the Nation, and (3) coordination of the administration of personnel, none of which belongs in any department but which are necessary for the over-all management of the Executive branch of the Government, so that the President will be enabled the better to carry out his Constitutional duties of informing the Congress with respect to the state of the Union, of recommending appropriate and expedient measures, and of seeing that the laws are faithfully executed.

#### IV

To facilitate the orderly transaction of business within each of the five divisions herein defined and to clarify the relations of these divisions with each other and with the President, I direct that the Bureau of the Budget, the National Resources Planning Board, the Liaison Office for Personnel Management, and the Office of Government Reports shall respectively prepare regulations for the governance of their internal organizations and procedures. Such regulations shall be in effect when approved by the President and shall remain in force until changed by new regulations approved by him. The President will prescribe regulations governing the conduct of the business of the division of The White House Office.

#### V

The Director of the Bureau of the Budget shall prepare a consolidated budget for the Executive Office of the President for submission by the President to the Congress. Annually, pursuant to the regular request issued by the Bureau of the Budget, each division of the Executive Office of the President shall prepare and submit to the Bureau estimates of proposed appropriations for the succeeding fiscal year. The form of the estimates and the manner of their consideration for incorporation in the Budget shall be the same as prescribed for other Executive departments and agencies.

The Bureau of the Budget shall likewise perform with respect to the several divisions of the Executive Office of the President such functions and duties relating to supplemental estimates, apportionments, and budget administration as are exercised by it for other agencies of the Federal Government.

#### VI

Space already has been assigned in the State, War and Navy Building, adjacent to The White House, sufficient to accommodate the Bureau of

the Budget with its various divisions (including the Central Statistical Board), the central office of the National Resources Planning Board, the Liaison Office for Personnel Management, and the Administrative Assistants to the President, and although for the time being, a considerable portion of the work of the National Resources Planning Board and all of that of the Office of Government Reports will have to be conducted in other quarters, if and when the Congress makes provision for the housing of the Department of State in a building appropriate to its function and dignity and provision is made for the other agencies now accommodated in the State, War and Navy Building, it then will be possible to bring into this building, close to The White House, all of the personnel of the Executive Office of the President except The White House Office.

This Order shall take effect on September 11th, 1939.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,  
*September 8th, 1939.*

[No. 8248]

## CHAPTER X

### THE CABINET

#### 61. FIRST CABINET MEETING

Nowhere in the Constitution is there any mention of a Cabinet or of any collective body to advise the President, nor has any law ever been enacted prescribing the organization or even the existence of such a body. It is evident, therefore, that the President may seek advice from whomsoever he will, and that these advisers meet together as a group whenever he desires. One of the earliest, if not actually the first, of such meetings, was held, in response to Washington's request, on April 11, 1791, and was attended by Jefferson (Secretary of State), Hamilton (Secretary of the Treasury), Knox (Secretary of War), and Adams (Vice President). Later meetings were attended also by the Attorney General (who did not, however, rank with the Secretaries as the head of an executive department until 1870); but the Vice President (Adams) apparently was not again present. Out of this beginning developed the institution known as the Cabinet.

[*Writings of George Washington* (Ford ed., published by G. P. Putnam's Sons), vol. XII, pp. 34-35.]

#### TO THE SECRETARIES OF THE DEPARTMENTS OF STATE, TREASURY, AND WAR.

Mount Vernon, 4 April, 1791.

GENTLEMEN,

As the public service may require, that communications should be made to me during my absence from the seat of government by the most direct conveyances, and as, in the event of any very extraordinary occurrence, it will be necessary to know at what time I may be found in any particular place, I have to inform you, that, unless the progress of my journey to Savannah is retarded by unforeseen interruptions, it will be regulated, including days of halt, in the following manner. [Here follow details of his travel plans.] . . .

After thus explaining to you, as far as I am able at present, the direction and probable progress of my journey, I have to express my wish, if any serious and important cases (of which the probability is but too strong) should arise during my absence, that the Secretaries for the Departments of State, Treasury and War, may hold consultations thereon, to determine whether they are of such a nature as to demand my per-

sonal attendance at the seat of government; and, should they be so considered, I will return immediately from any place at which the information may reach me. Or should they determine, that measures, relevant to the case, may be legally and properly pursued without the immediate agency of the President, I will approve and ratify the measures, which may be conformed to such determination.

Presuming that the Vice-President will have left the seat of government for Boston, I have not requested his opinion to be taken on the supposed emergency; should it be otherwise, I wish *him* also to be consulted. I am, Gentlemen, your most obedient servant.

## 62. CONFIRMATION OF CABINET APPOINTMENTS

Although the Constitution and the laws require senatorial confirmation for important appointments, it has become an accepted principle that the President should ordinarily have complete freedom in selecting his immediate advisers. Cabinet appointments are therefore confirmed, usually without opposition and as a matter of course. However, when President Coolidge in 1925 nominated Charles B. Warren, who had served as Ambassador to Japan and Mexico, to the office of Attorney General, the Senate refused to confirm, first by a tie vote of 40-40, unbroken through the absence of Vice-President Dawes, and changed on reconsideration to 39-41. President Coolidge promptly resubmitted Mr. Warren's name, but again the Senate refused to confirm by a still larger majority (39-46). The President, having also failed in his purpose to give Mr. Warren a recess appointment, thereupon nominated John G. Sargent, a comparatively unknown lawyer from Vermont, who was immediately confirmed without opposition.

### a. Debate in Senate

[*Congressional Record*, vol. 67, pp. 18-19, 31-32, 74-75, 83-84, 254-258.]

### NOMINATION OF CHARLES BEECHER WARREN

The Senate, in open executive session, resumed the consideration of the nomination of Charles Beecher Warren, of Michigan, to be Attorney General of the United States. . . .

MR. WALSH. Mr. President, I subscribe to the doctrine that under all ordinary circumstances the nominations of the President of the United States for members of the Cabinet should be confirmed by the Senate without delay and that opposition of a political or factional character ought to be discountenanced. The President is charged by the Constitution to take care that the laws be faithfully executed, and he ought to be given the greatest liberty possible in the selection of those who immediately under him are to carry out his policies in accordance with the laws of Congress. Nevertheless the founders of our Government, the

framers of our Constitution, deemed it unwise to trust unrestrictedly to any one man the appointment of any of the principal officers of the Government, and accordingly provided that in the case of all nominations made by the President of the United States confirmation by the Senate should be necessary except in the case of such inferior officers as Congress might provide should be appointed by the President alone, by the courts, or by the heads of the departments. The responsibility, accordingly, for the appointment of all the Federal officers where confirmation is necessary rests upon this body jointly with the President of the United States. Whether equally or in lesser degree it is unnecessary to canvass. It is indisputable that we share that responsibility and that we must assume it, at least in part.

All will agree that if a nominee, even for a Cabinet position, is lacking in moral character, he should be rejected by the Senate; but it is contended by some that otherwise his confirmation should follow as a matter of course. I can not think so. A man may have some serious blemishes in the matter of his private character and still be an able administrator and a courageous and patriotic official. Instances of that character will readily occur to any student of history. On the other hand, a man may have led the most exemplary life and yet be totally unfit for the duties and responsibilities of high official position. It is unwise, even if it were possible, accordingly to attempt to lay down any general rule which ought to govern the Senate in its action upon nominations for public office.

The nomination before us warrants, and as I think imperatively demands, a departure from the general rule. In the active propaganda which has been carried on through the press to break down or wear down the opposition to the nomination of Mr. Warren it has been repeatedly asserted that there is no instance on record of the rejection by the Senate of the nomination for the head of any of the departments. That is not correct. So good a man as Roger B. Taney, afterwards Chief Justice of the Supreme Court of the United States, was rejected by the Senate as a nominee for Secretary of the Treasury by Andrew Jackson. The illustrious Caleb Cushing, afterwards Attorney General of the United States, and whose career is a part of the glory of that office, was rejected for Secretary of the Treasury during the administration of President Tyler. Two other nominations for Cabinet positions sent to the Senate by that President were likewise rejected—that of James M. Porter, of Pennsylvania, nominated for Secretary of War, and David Henshaw, of Massachusetts, for Secretary of the Navy. During the administration of President Johnson the nomination of Henry Stanbery, of Ohio, for Attorney General, was rejected by the Senate. . . .



Three times, Mr. President, within the past six years the office of Attorney General has been filled, as in the instance of the present nominee, by men who were named for the place not as a reward for eminent success at the bar or brilliant attainments in the law but as a reward for active political service. In two of these instances the career has not shed any particular luster upon the office nor any particular credit upon the appointing power, whatever may be said with reference to the Senate in confirming them. It is neither exaggeration nor hyperbole to assert that the result has approached disaster, so far as the public interests are concerned. What may happen in the case of the confirmation of the nomination of Mr. Warren we can only speculate, but, in the language of the orator of the Revolution, "I know no way of judging of the future but by the past."

Mr. Warren, it is no injustice, I think, to say, has no reputation whatever as a lawyer. The attachés of the Supreme Court of the United States apparently have no recollection of ever having seen him before that tribunal in the presentation of a case. It is said in his behalf, Mr. President, that he represented the United States in two important international arbitrations—the Bering Sea fur-seal arbitration and the North Atlantic fisheries case. He did, indeed, appear on the record in the fur-seal arbitration, but we were represented in that proceeding by Mr. Don M. Dickinson, of the city of Detroit, Mich., and, as my information is, Mr. Warren, at that time being 26 years of age, was a clerk in his office and went on the record with him. He did, however, make an argument in the North Atlantic fisheries case at The Hague, and I must say, to his entire credit, that the argument was lawyerlike in character, and indicated that Mr. Warren is a man of ability; but, as I have stated, I think I do him no injustice whatever to say that he has no reputation whatever as a lawyer.

I think that he ought not to be made Attorney General not only because he is not eminent in the profession but chiefly because for years he was a representative in his State of the Sugar Trust, one of the most offensive and oppressive trusts with which the American people have unfortunately been familiar in the present and past generations.

In the course of the efforts of that organization to monopolize the supply of sugar of the American people it first secured control of the Atlantic coast refineries, refining raw sugar imported from Cuba and other places. Having practically accomplished the consolidation of all of the competing companies engaged in the refining business, it encountered the opposition of the beet-sugar producers. Then, in the early part of the

present century, it set out to secure control of all the beet-sugar companies.

At that time there were in the State of Michigan a half dozen small beet-sugar companies, each competing with the others and entirely independent. Prosecuting its purpose, the Sugar Trust sought to secure control of these various companies. One of them, the Peninsula Sugar Co., was, I believe, organized by Mr. Warren; at least, he owned a considerable amount of stock in the company as well as some stock in the other companies to which I have adverted. Mr. Havemeyer, who was then the dominant intellect of the Sugar Trust, was desirous of getting control of those companies, and Mr. Warren acted as his agent in securing that control. He went out and bought up enough of the stock of the independent beet-sugar companies of the State of Michigan to control them, taking the conveyance in his own name but using the money of Mr. Havemeyer and his associates and holding the stock in trust for them.

Subsequently they organized the Michigan Sugar Co., of which Mr. Warren became the president and remained president down to the 25th of January last, as my information is. In the same way the stock of the local companies was turned in in exchange for stock in the Michigan Sugar Co., the stock being issued again in the name of Mr. Warren and being held by him for some time, the trust having acquired 46 per cent of the stock of the Michigan Sugar Co. Thereafter, in the year 1910, the Government of the United States began suit under the Sherman Antitrust Act to dissolve the Sugar Trust, making the Michigan Sugar Co., as well as Mr. Warren individually, defendants in that action, and charging they had both participated in the conspiracy to monopolize the beet-sugar industry of the country. . . .

Furthermore, Mr. President, the Michigan Beet Sugar Co. is now charged by the Federal Trade Commission with being engaged in another conspiracy to restrain trade. It is charged that the Michigan Sugar Co. and a large number of other companies have entered into an unlawful contract with the Larrowe Milling Co. under which the Larrowe Milling Co. becomes the agent of all these corporations in the sale and disposition of beet pulp, except as to small quantities held for local distribution and consumption. . . .

As is well known, if it should be found by the commission that such unfair methods have been employed an order will be issued, commanding the various parties to desist from that method of procedure; they may then appeal from the order of the commission to the circuit court of ap-

peals, and it then becomes the duty of the Attorney General of the United States to represent the Government. On such an appeal, therefore, Mr. Warren, if his nomination shall be confirmed, will be called upon to represent the Government of the United States in proceedings in which the Michigan Sugar Co. is a party defendant.

But, Mr. President, that is not all. There are now before the Department of Justice a long list of cases referred to that department by the Federal Trade Commission for appropriate proceedings under the various laws enacted by Congress concerning the restraint of trade and commerce. I shall not take the time now to refer in detail to those cases; but let me refer to the fact that the Federal Trade Commission some time ago found that the Aluminum Trust, at the head of which is the present Secretary of the Treasury—I say at its head; he was at the head of it before he became Secretary of the Treasury, and presumably still holds his interest in the organization—has not only been guilty of monopolizing trade and commerce in violation of the Sherman Act, but has actually violated a decree of the court rendered against that organization and is now in contempt of the court. Just imagine the Aluminum Co. of America being brought to book by Charles B. Warren for having violated the Sherman Antitrust Act!

Bear in mind that that case was referred by the Federal Trade Commission to the Attorney General, and the late Attorney General, Mr. Stone, practically approved the findings of the Federal Trade Commission and declared that the Aluminum Trust, as a matter of fact, was in contempt of court for a violation of the decree against it.

[Then follows the text of the letter from Attorney General Stone to the Chairman of the Federal Trade Commission.]

Mr. President, if this nomination is confirmed by the Senate of the United States, there is just one consistent thing for the Congress of the United States to do, and that is to wipe the Sherman Act off the statute books, to repeal it forthwith. Confirm this nomination and you might as well hang out a sign that for the period of the life of this administration the Sherman Act is suspended. Confirm this nomination and you extend an invitation to every plundering monopoly in the country to extend and fasten its tentacles upon the American household.

I can not believe that Senators can consider this record and think that they discharge their duty in voting for the nomination of Charles B. Warren for Attorney General of the United States.

MR. CUMMINS. Mr. President, I have an advantage in presenting this matter that is not enjoyed by every Member of the Senate. I have

known Mr. Warren for more than 20 years; I hold him in such high esteem as a man and I have such admiration for his brilliant qualities of mind that it is a peculiar pleasure for me to attempt, at least, to respond to the charges made by the Senator from Montana.

Mr. Warren, since the happenings that were cited by the Senator from Montana, has been twice confirmed by the Senate for high and responsible office. I am not sure that I am correct in my recollections, but I think I have heard the Senator from Montana say, either in the very able speech that he made on Saturday or in the consideration of this subject before the committee, that if Mr. Warren had been nominated for the position of ambassador to a foreign country, if he had been nominated for Secretary of State, if he had been nominated for any other office than that of Attorney General, he would have presented no objection to his confirmation. I should like to be sure that I quote the Senator from Montana correctly when I say that.

MR. WALSH. The Senator has quoted me with substantial accuracy.

MR. CUMMINS. Upon that assumption, there lies no objection to this confirmation by reason of the character of the nominee; there lies no objection by reason of any infirmities, if I may so call them, of his mind or his heart. The objection comes to this—and it was clearly stated by the Senator from Montana, to whom I want to pay the compliment of saying that, while I do not always agree with him, I always understand what he says and what he means to impart to the Senate—the objection to Mr. Warren is, projecting ourselves into the future as best we can, that he would not faithfully execute the laws of the United States and especially that he is unfitted by reason of his experience and associations to enforce what is commonly known as the antitrust law. That narrows the consideration of the subject before this body within very limited bounds, and I shall endeavor just as briefly as I can to examine that objection.

First, let me remark that the objection implies a very serious disparagement of the profession to which the Senator from Montana belongs and to which he is so great an honor. It implies that because a lawyer has been faithful to one client he will not be faithful to another. There is no escaping the proposition that the Senator from Montana means to say, and I predict the Senator from Missouri [MR. REED] will say, that Mr. Warren will abandon his duty if he becomes Attorney General and will not serve the United States as diligently and as faithfully and as successfully as he has served the clients who heretofore have employed his services.

I want, with all the earnestness that I have, to dissent in the beginning from that proposition. I intend to examine just what Mr. Warren's

connection with the American Sugar Refining Co. and the Michigan Sugar Co. was; but I want to begin by saying that if he is an honest man—and that seems to have been implied in the statement that I have imputed to the Senator from Montana—he will execute the laws of the United States just as faithfully and as diligently and as perfectly as it lies within his power to do so. . . .

Before I proceed, however, to the history of Mr. Warren with regard to the sugar industry in Michigan, I want to confirm the view that has been announced by the Senator from Montana with regard to our duty in this matter. I may not do it in the exact language which he has used, but there is no substantial difference between us with respect to it.

It should be borne in mind throughout the consideration of this nomination that it is for a place among the close, intimate, and confidential advisers of the President; and in my judgment the rule which should be applied in performing the functions of the Senate in connection with such a nomination is not quite the same as the rule which ought to be applied to other officers of the Government whom the President under the Constitution must appoint. We should, of course, insist that the men he selects for his official family are men of high character. That seems not to be disputed here. We should insist that they are men well disposed toward their country and its institutions. That test seems to be fully answered. In addition to all the other services which Mr. Warren has rendered to his country, his work during the war was of the highest order; and if anyone is in doubt with respect to his legal qualifications, his qualifications as a lawyer, I would suggest that he inquire of Gen. Enoch H. Crowder, whose assistant he was during the war. I think we all know that his service in that capacity merits the highest esteem. . . .

We should also insist that these members of Mr. Coolidge's official family have an understanding of public affairs, and we should insist that the execution of the laws can be fairly intrusted to them. That, I think, is the substance of the test announced by the Senator from Montana, and I am entirely satisfied with that announcement.

Further than that, however, we ought not to go. We ought not to deny Mr. Warren confirmation simply because we would not have selected him had the choice been ours. The President has selected him, and we ought to leave the President a free choice and hold him responsible for the faithful execution of the laws.

[Then follows a defense by Senator Cummins of Mr. Warren's trust connections.] . . .

MR. BAYARD. I am afraid I misunderstood the Senator, and I do not want to be incorrect in making statements hereafter on the record. Am

I correct in my recollection that the Senator said in the earlier part of his remarks to-day that if the President saw fit to nominate Mr. Warren or any other Cabinet officer as a member of his official family and secured his confirmation by the Senate thereafter we would hold the President responsible for the shortcomings of Mr. Warren or any other officer in his Cabinet? Am I right in substance?

MR. CUMMINS. I said substantially that; and let me say that the Senator and his party did hold the President responsible for Mr. Daugherty; they did hold him responsible for Mr. Denby.

MR. BAYARD. Oh, yes.

MR. CUMMINS. They did hold him responsible for Mr. Fall. Why not hold him responsible, then, for the other members of his official family?

MR. BAYARD. I think I can answer that now, if the Senator will allow me a moment. Last year, when we undertook to advise the President that the opinion of the Senate was that he should get rid of Mr. Denby, the President very frankly told us that was none of our business. That is all we got out of the present President. He is in for another four years more and wants to start in on the new term of four years with an Attorney General against whom we shall have nothing to say. That is the President's point of view. If we confirm Mr. Warren our lips are sealed, according to President Coolidge's stand on this matter; that is, if we shall once confirm an officer of his Cabinet, from that time on we shall say nothing about him.

MR. CUMMINS. The Senator does not understand me to say that he is precluded from voting against Mr. Warren. He evidently intends to do so, and I think he has a perfect right to do so.

MR. BAYARD. No; I do not mean that; the Senator misunderstands me. What I mean is this—

MR. CUMMINS. The Senator must mean that. The questions which he has asked me indicate very clearly his attitude toward Mr. Warren.

I think that if Mr. Warren is confirmed and does not enforce the laws of this country, not only against those who violate the antitrust law but those who violate all other laws of the country, I think the Senator will hold the President responsible; I think he will say that Mr. Coolidge is a very poor President, and possibly he will say that anyway. But I have not said that we ought to confirm any man who may be proposed for a Cabinet office merely because he is a member of the official family of the President; I have not said that. I tried to repeat with a variety of phrase the view presented by the Senator from Montana.

MR. BAYARD. The Senator has misunderstood me. I understood the



Senator, in substance, to say that if we should confirm this nominee and thereafter Mr. Warren should be derelict in his duty in any respect—I do not care what—that we would then have to complain to the President or could criticize the President or, as the Senator puts it, hold him responsible. That is the substance of it.

MR. CUMMINS. I think there is a fine sense in which the President is held responsible for the performance of the duties of the officers composing his Cabinet; I think that is so; but that does not relieve such officers of the criticism which would fall upon them if they failed to perform their duties. I can not quite catch the nice and delicate view the Senator from Delaware is trying to express.

MR. BAYARD. I will repeat it, then, in another form. Last year we told the present President that the Senate was of the opinion that he ought to dismiss Mr. Denby because of certain things Mr. Denby had done. The President told us very frankly that was none of our business; that was his business alone, and that a Cabinet officer having once been confirmed, the President had the right to keep him in office so long as he saw fit and so long as the President was in office himself; that was the substance of what we got from the President. Over and above that, with his knowledge of what Mr. Daugherty was doing he kept Mr. Daugherty in office, although we were "showing up" Mr. Daugherty; and so it is in evidence on the part of the President as to how he will conduct himself with a positive knowledge of the acts of his Cabinet officers.

The point I want to bring out in regard to what the Senator from Iowa said in the beginning of his remarks is this: He said we would hold the President responsible for the acts of his Cabinet officers.

MR. CUMMINS. The Senator and his party did hold the President responsible during the entire campaign last fall. Holding the President responsible for the conduct of Mr. Denby and Daugherty and of Mr. Fall, all of whom were appointees of the former President, constituted the greater part of their campaign. Is not that true?

MR. BAYARD. No; I do not think so. I think the campaign went off on another matter entirely.

MR. REED of Missouri. Mr. President, if the Senator will pardon me, the plea on the other side was that Mr. Coolidge was a perfectly good and honest man who had inherited these wicked creatures and that he should not be at all blamed.

MR. CUMMINS. We had better not drift into these reminiscences of the campaign. I think that the Senator from Delaware understood me perfectly.

MR. BAYARD. If I did, then I shall go ahead later on and say what I have to say.

MR. CUMMINS. Precisely. I think the President is responsible for his Cabinet in a way in which he is not responsible for the other or general officers of the Government. I understood the Senator from Montana substantially to state that and I was merely trying to agree with the Senator from Montana. If the Senator from Delaware feels that I ought not to agree with him, I will retract my statement.

MR. BAYARD. I did not mean that for a moment.

MR. CUMMINS. No; I know that.

. . . . .

MR. GILLETT. Mr. President, I appreciate that the sentiment of this body is that new Senators, like children, should be seen and not heard; but I am a member of the committee which reported this nomination, and I will endeavor by my brevity to try to make some amends for my presumption, although I must admit that during the few days which I have spent here the deepest impression I have received is the different estimate of the value of time here and in the body at the other end of the Capitol. I hope I shall not show that I am already unduly infected by this atmosphere. [Laughter.]

The rejection of the nomination of Mr. Warren is, we all recognize, an extraordinary happening. During a period of over 50 years never has the nomination of a man for a position in the President's Cabinet been rejected. During that time both Republicans and Democrats on the stump have assailed and denounced and reviled and vituperated some of their opponents, compared with which the invective of the Senator from Missouri the other day was but as the cooing of a turtle dove; and yet when the nominations of those same men for Cabinet offices were subsequently sent to the Senate for confirmation not a word was raised against them and they were confirmed. Why? Because it is, I believe, the general opinion and conviction of the people of this country—and I would have said, until last week, the settled opinion and conviction of this body—that any man nominated by the President to be a member of his official family should be confirmed unless there are against him flagrant charges of incompetency. There are no such charges against Mr. Warren. Those attacking him admit that they would confirm him for any other Cabinet position. Why will they not confirm him for the position of Attorney General? They say it is because from 15 to 25 years ago, as a young man, he was counsel for "trusts" and probably himself acted as a member of what were called "trusts." That of itself,

they do not claim, disqualifies him; but the argument is made that because in those years he acted as counsel for "trusts" he became so affected and so mentally biased and so fixed in his resolution that he could not now efficiently prosecute the law against "trusts."

I would prefer that Mr. Warren had never had any such connections. I would wish that any lawyer who is presented for Attorney General had never been on anything but the right side of every case he had ever had. I would wish he had never advised any client to do something which a court subsequently held to be illegal; but if we should take that as a test of confirmation, we would shut out a majority of the big lawyers of the country. Big lawyers are attracted to the big cities, when they are employed by big business. Big business during all the early years of this century was trying to adjust itself to the constantly changing interpretations of the trust laws, and every big lawyer who was employed by them, uncertain what the law might be next year, was trying to advise them as he thought was for their interest. The Sugar Trust was not then the object of general contumely that it afterwards became, because those scandals which turned against it the decent sentiment of the country had not then been revealed. But because this lawyer acted for the Sugar Trust and perhaps participated in local trusts as a director and president is he thereby to be shut out forever from public employment against trusts? The only question is, and that is the question which I understand is raised on the other side, Did he thereby become so mentally warped, did his attitude become so biased and so narrow that he can not now properly perform the duties of Attorney General? . . .

Mr. President, I admit that I am myself a good partisan. I do not pretend that I can approach such questions as this without some bias, and I do not believe that Senators on the other side can, but I will say this, that if four years from now we are punished for our sins with a Democratic President, which to-day looks as improbable as it is undesirable, if that shall come about, I promise that I will vote for the confirmation of any Cabinet officers whose names the Democratic President may send down to the Senate if they have half the fitness Mr. Warren has, even though the whole Republican Party may be against me. . . .

MR. BORAH. Mr. President, it was not my original purpose to take any part in this debate. As chairman of the subcommittee which had to do with passing upon the fitness of Mr. Warren to be Attorney General, I reached a conclusion to the effect that I could not cast my vote for his confirmation. I announced that conclusion and felt that in all probability I could fully discharge my obligations to the situation by simply casting my vote. But as the debate has proceeded and some phases of

the controversy have been developed, and for the purpose of helping to complete the record, I have concluded to take a few moments of the time of the Senate to express my views upon some features of the controversy.

I am not very much concerned about the charges and countercharges of partisanship or of party disloyalty. It would be more fitting to discuss those matters in other bodies than in this, and they will have to be settled in another forum; but there is one feature of the subject which is of concern and which I think ought to be fully considered not only for the present case but for all future time.

The President of the United States is authorized by the Constitution to nominate men for certain public offices, and the Senate of the United States must advise and consent before the appointments take place. The powers of the President with reference to appointments to office are very limited, most circumscribed. His power to appoint obtains only and alone concerning those appointments which are necessary to fill up vacancies that happen during a recess. In this instance before us he has only the power to nominate, and the question arises, What are the duties of a Senator and what is the duty of the Senate in case a Senator or a majority of the Senate have fairly and honestly reached the conclusion that they should not advise and consent?

Is the obligation which rests upon us merely a perfunctory one? Is not the obligation a most exacting one? Have we not a full share, and an inescapable share, of the responsibility for a strong, a clean, and a patriotic Government?

The argument has been advanced here and elsewhere, and particularly in the able editorial pages of the press, that the Senate ought to yield entirely to the judgment of the President; that we ought to treat the obligation which is imposed upon us by this provision of the Constitution as nothing more than a courteous gesture, and that really no part of the responsibility for this official or for other officials rests upon us; that it rests wholly and exclusively upon the President. Such is not the Constitution. Such is not the obligation we have assumed.

I am frank to admit, Mr. President, that to a marked degree, in practice, that has been the construction of the Constitution. It has arisen very largely out of the fact that all people regardless of party respect the Presidency and all people respect the man who has become President of the United States regardless of which party places him there. Therefore no Senator and no Senate ever challenges an appointment of the President of the United States unless upon most substantial and controlling reasons which appear to them to be guiding and conclusive

reasons. In all the long history of nominations by Presidents and the confirmations which have taken place there have been but few controversies in regard to the matter. . . . In my humble opinion if there has been dereliction of duty it has not been on the side of opposing the President but it has been rather a disposition to shirk for ourselves and to put upon the President the sole responsibility, a very large portion of which is upon the Senate, inescapably upon the Senate.

I have no doubt either that things have happened within the last few years which have not only aroused the country, but aroused the Senate to the necessity of reexamining its duty and its obligation with reference to this important part of executive duties devolving upon us. I have no doubt that incidents could be recalled, if it were not unpleasant to do so, which, even if there had never been a precedent before, would be sufficient to justify the Senate in adopting a more rigid and more exacting and more determined rule in regard to their conduct in these matters. It is not a perfunctory duty. It should no longer be considered as such. I agree, however, perfectly with those who say that only upon the most substantial grounds and the most controlling reasons should we oppose a nominee of the President. . . .

Mr. President, if I should be called by chance to the White House to advise the President concerning an appointment coming from my State, what would be my plain duty? If any Senator in this Chamber were called to the White House for the purpose of advising with reference to the appointment of a Federal judge or a district attorney or a United States marshal, what would be his plain duty? If he thought the man unfit, it would be his solemn obligation to so advise the President; and if he did not do so he would either be an intellectual coward or he would be unfit for other reasons not mentionable to advise the President or to represent a State. And now, sir, when the obligation is imposed upon me not only by the confidence which might be reposed by the people whom I represent, but when that obligation is imposed upon me by the Constitution itself and when I have taken an oath to support the Constitution, what is my plain duty when the facts are presented to me and they convince me that Mr. Warren is unfit? It is put up to me by the charter under which and by authority of which we are here. The Constitution imposes upon the President the duty to nominate. It imposes upon me the duty to advise. How shall I advise—honestly and sincerely or in deception and insincerity?

What is my plain duty? It is not a formality. It is not a matter about which I have a right to surrender my opinion. In refusing to



treat it as a formality, in refusing to surrender my opinion, I challenge not at all the integrity of mind or purpose of the President of the United States; I challenge not at all his performance of duty as he sees it. I expect him, knowing him as I believe I do, to meet that obligation according to his convictions, and if I do less than meet mine here I shall quickly forfeit the respect of the President and, most of all, my self-respect. . . .

Mr. President, under present circumstances and conditions the Attorney Generalship, to my mind, is the most important office within the nominating power of the President of the United States, with the possible exception of the Chief Justiceship of the Supreme Court. That would not always be true. That has not always been true. But in the circumstances which now confront us and with which we have to deal there is no more important office in the nominating power of the President than the Attorney Generalship of this Government. He is to stand forth to enforce the laws and to administer justice through a vast machinery for 110,000,000 people. In view of the conditions which now confront the country, no more burdensome task, no task requiring greater breadth, greater courage, and finer character, can be conceived than are required in the discharge of the duties of that office. It is not, in other words, an office which is calculated to lull Senators into being disregarding of their duty in this instance, and that is particularly true when we look over what has happened in the last few years. Past events call to us to be vigilant and to assume our full share of responsibility.

Without going back to discuss individuals, I venture to say that there is no Senator here but has felt humiliated more than once and discomfited many times by reason of conditions which have prevailed in that office for the last 10 or 15 years. There have been exceptions. The exceptions are well known. Therefore, my generalization should not be regarded as an indiscriminate attack; but under the conditions which confront us the country expects us to meet, and we ought to be impelled by our own sense of duty to meet in the fullest measure our part of the obligation incident to the filling of this office.

There are those who believe that Mr. Warren is well fitted for the position, and they will undoubtedly vote for him for that reason. I have no quarrel with them. The only man with whom I quarrel is the man who, while thinking Mr. Warren unfit, yet would surrender his judgment when it comes to the vote, or those who tell us it is none of our concern who fills these positions. . . .



## b. Statement of President Coolidge

[*N. Y. Times*, Mar. 15, 1925.]

The White House.

Notwithstanding various reports and rumors, the President is making every possible effort to secure the confirmation of Mr. Warren.

As the time is very short and to accommodate the Senate he has consulted certain men and certain Senators as to what course should be pursued in case Mr. Warren is not confirmed. He has decided on no other appointment. He will offer him a recess appointment.

He hopes, however, that the unbroken practice of three generations of permitting the President to choose his own Cabinet will not now be changed and that the opposition to Mr. Warren, upon further consideration, will be withdrawn in order that the country may have the benefit of his excellent qualities and the President may be unhampered in choosing his own methods of executing the laws.

March 14, 1925.

## c. Coolidge-Warren Correspondence

[*N. Y. Times*, Mar. 18, 1925.]

THE WHITE HOUSE,

Washington,  
March 16, 1925.

My Dear Mr. Warren:

As already indicated by me, in case there is a vacancy in the office of Attorney General after the adjournment of the Senate I shall offer you a recess appointment to that office. This offer is made, in the first place, as a testimony to the unshaken confidence which I have in you, and, in the second place, because I believe you are qualified to conduct that office for the public welfare.

I wish to express my great regret that any action of mine should have brought you into a political controversy. My regret is all the more keen because you made patriotic response at a great deal of personal sacrifice, when I sought you out without any action on your part and asked you again to enter the public service of your country, in which on several previous occasions you had already attained to great eminence. This disappointment is only modified by the fact that from those who have

refused confirmation come the strongest assertions that they would gladly approve you for any other position of trust and responsibility.

With kindest regards and deepest appreciation, I am, very truly yours,  
CALVIN COOLIDGE.

Hon. Charles B. Warren,  
Detroit, Mich.

THE WHITE HOUSE,

Washington,  
March 17, 1925.

Dear Mr. President:

Your confidence in me was deeply appreciated when you evidenced it by tendering me so important a place in your Cabinet. I am again indebted to you for your renewed expressions of confidence in your note of March 16 proposing to tender me a recess appointment as Attorney General.

I shall always like to remember that the political controversy which has arisen concerning this position has not in the least affected your faith in me, and I have been apprised that those who know me fully share in your belief.

Had I not known that I could serve you and the Government with all my powers, whatever they may be, I naturally would not have accepted your offer of the position.

But I am not willing to have prolonged a political controversy that might lessen your opportunities for full usefulness to the nation, and possibly interfere with your making wholly effective your policies.

I cannot, therefore, in fairness to you and the Republican Party refrain from declining your offer of a recess appointment, and I hope that you will make another nomination for confirmation.

I am, my dear Mr. President, faithfully yours,

CHARLES B. WARREN.

The President, the White House.

### 63. REMOVAL OF CABINET MEMBERS

President Taft in 1912 and President Wilson in 1915 set aside certain public lands in California and Wyoming as naval oil reserves, and Congress, by an act of June 4, 1920, placed these reserves (known respectively as Elk Hills and Teapot Dome) under the control of the Secretary of the Navy. President Harding, by an executive order of May 31, 1921, transferred the administration of these regions to the Secretary of the Interior, and thereupon Secretary of the Interior Fall and Secretary of the Navy Denby leased these lands to the Sinclair and Doheny oil

companies under circumstances that gave rise to suspicion of fraud and corruption. Secretary Fall resigned from the Cabinet in 1922, and later there was a prolonged investigation of the whole transaction by a Senate committee. Following the revelations of this committee, the Senate debated at length and on February 11, 1924, adopted by a vote of 47-34, a resolution demanding the removal of Secretary Denby. This action raised the question of the right and propriety of the Senate in thus attempting to influence the President with respect to his Cabinet.

#### a. Senate Resolution of February 11, 1924

[*Congressional Record*, vol. 65, p. 2245.]

Whereas the United States Senate did on January 31, 1924, by a unanimous vote adopt Senate Joint Resolution No. 54, to procure the annulment of certain leases in the naval oil reserves of the United States; and

Whereas the said resolution, among other things, declared as follows:

"Whereas it appears from evidence taken by the Committee on Public Lands and Surveys of the United States Senate that certain lease of naval reserve No. 3, in the State of Wyoming, bearing date April 7, 1922, made in form by the Government of the United States, through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Mammoth Oil Co., as lessee, and that certain contract between the Government of the United States and the Pan American Petroleum & Transport Co., dated April 25, 1922, signed by Edward C. Finney, Acting Secretary of the Interior, and Edwin Denby, Secretary of the Navy, relating, among other things, to the construction of oil tanks at Pearl Harbor, Territory of Hawaii, and that certain lease of naval reserve No. 1, in the State of California, bearing date December 11, 1922, made in form by the Government of the United States through Albert B. Fall, Secretary of the Interior, and Edwin Denby, Secretary of the Navy, as lessor, to the Pan American Petroleum Co., as lessee, were executed under circumstances indicating fraud and corruption; and

"Whereas the said leases and contract were entered into without authority on the part of the officers purporting to act in the execution of the same for the United States and in violation of the laws of Congress; and

"Whereas such leases and contract were made in defiance of the settled policy of the Government, adhered to through three successive administrations, to maintain in the ground a great reserve supply of oil adequate to the needs of the Navy in any emergency threatening the national security": Therefore be it

*Resolved*, That it is the sense of the United States Senate that the President of the United States immediately request the resignation of Edwin Denby as Secretary of the Navy.

### b. Senate Debate on Denby Resolution

[*Congressional Record*, vol. 65, pp. 2072-2074, 2231-2232.]

MR. BORAH. Mr. President, I shall be comparatively brief, I trust, in stating my position in regard to the pending resolution. I am unable to support it. The resolution before us has reference to Mr. Denby alone, undoubtedly to be followed by other resolutions of a similar nature with reference to other public officers. I shall not stand in the way by vote of any investigation of any public official concerning whom a resolution may be introduced if there are any facts to support an investigation. But I have some views with reference to the manner in which we should deal with this matter, which views are controlling. I am perfectly aware that just at this particular time, under the dreadful revelations which have been made and a very just aroused feeling which obtains throughout the country, the view which I entertain will not be regarded, perhaps, as coming up to the full measure of duty at this time. But I must be controlled by the plain fundamental provisions of our Constitution and depend upon time to justify my position. Permanent good and substantial results are only accomplished in matters like these by pursuing lawful and constitutional methods.

Several views have been taken of Mr. Denby's conduct. The view which has been advanced so often that he is incompetent, that he actually did not know what was going on, that he is practically, when we interpret it in its full logic, *non compos mentis*, does not appeal to me at all. It is indeed not true. Any one who knows Mr. Denby knows that he is entirely responsible for what he does. He is a most practical business man and of large and long public experience. He is entirely responsible.

I do not accept the view, Mr. President, with reference to others who were connected with this matter that they did not know what they were doing. There are, in my opinion, just two rules by which we can gauge Mr. Denby's conduct. First, that the man candidly believed that he had the legal power to do what he did, and that he thought it was in the public interest, or that he was a part and parcel of an organized conspiracy to despoil the Government of its great natural resources. Mr. Denby could not have occupied the place he did with reference to this transaction and not have been sufficiently informed to know what was to be the result of this action. He might have believed that the statute

which he construed before the committee in May, 1922, was legally ample for all that he was doing; but if we take the view that he did not know or did not believe, in other words, that it was legally ample, and he was doing his duty, then we must go, in my judgment, the full length of associating him with those who are claimed to have acted from wholly illegal motives.

I am going to assume, therefore, for the sake of this argument, that Mr. Denby did know what he was doing; and I am going to assume, furthermore, for the sake of the argument, that he was guilty of the transaction in the fullest sense of the term. I do that not because it necessarily expresses my view in regard to the matter, one way or the other, but for the reason that, even assuming that he is entirely guilty, my vote must be the same with reference to this resolution.

There is only one punishment sufficient for Mr. Denby, only one measure which will be efficient, and which will fit the offense, and that is, not a mere dismissal from office, but an arraignment before the proper tribunal, a trial and ejection from office, carrying the stamp which impeachment and conviction would place upon him for all time. If guilty at all, he is guilty of a most heinous offense, one which is thoroughly within the law of impeachment, and one for which impeachment should be had. There is no other way to mete out the punishment justly due.

In my opinion, Mr. President, if Mr. Denby is guilty as charged by the Senator from Missouri [MR. REED], as charged by the Senator from Montana [MR. WALSH], and by other Senators who have spoken upon this matter, if he is in any sense culpable as presented here, a mere dismissal from office would be trifling with the subject. It would not satisfy the country, and justly so; it would not satisfy justice; it would not be at all commensurate with the performance of our duties here as Senators. If a man may be guilty as charged here upon the floor of joining in secrecy and with those who were moved by wrongful motives, for the purpose of despoiling the Government of its property, and may be permitted to go with nothing more than a dismissal from office, to my mind, it would be wholly inadequate and impotent in the way of the performance of our duty.

But that is not all, Mr. President. In my opinion, impeachment is the only way by which we can lawfully and constitutionally proceed in this matter. It is the constitutional way; it is the effective way; it is the drastic way; and it is the way by which we can mete out the punishment for this offense if it has been committed, and in no other. . . .



Mr. President, we come now to the mere question of dismissal for said incompetency. I am equally certain upon that point, for this reason: The right of dismissal belongs alone to the President of the United States. Under the Constitution, as has been determined many times, we have nothing to do with the appointed officer after he is appointed. We have the right to advise and consent with reference to the appointment; but, after the appointment is made, whether the President shall hold him there or dismiss him is a matter exclusively for the President to determine. I think that is far more than what has been referred to here to-day as a quibble. I think it is an essential principle of constitutional government, an essential principle with reference to the division of powers in the Government. As Mr. Madison once said, "It is an essential principle for the preservation of liberty under our form of government."

The President of the United States is made solely responsible for the execution of our laws. As Mr. Madison so well said in the great debate early in our history, so long as the President is charged with the execution of the laws he should be neither hampered nor embarrassed with reference to the dismissal or retention of officers during the time they are permitted to hold office under the law, and that is an essential principle of our division of powers under the Government. When that great debate took place—which Mr. Evarts once said, perhaps the greatest debate that was ever held in the Congress upon a constitutional question—in which Mr. Madison took part, they regarded it as vital. After a long discussion it was settled that so far as the Congress or the Senate were concerned they had nothing whatever to do with the dismissal of a public officer; that that rested alone with the Executive; that he should not be embarrassed or hampered in this action by an attempt upon the part of the Senate to control him.

That remained the policy of our Government practically down until the passage of the tenure of office act, I think in 1867—in my judgment one of the most vicious laws which was ever passed by the Congress—in which the Congress undertook to control the question of appointment and retention in office upon the part of the President. That act was finally modified in 1869 so as to give the President the power of suspension during a certain length of time until the Congress should come in. I have always believed that the act was unconstitutional, although it was never actually tested in the courts. Finally, when Grant came to be President, in his first message to Congress he insisted that that act should be repealed; that it was an attempt to interfere with the power



of the President in the faithful discharge of his duties; that the President was not responsible to the Congress, not responsible to the Senate for the execution of the laws or for the retention of his officers, but was responsible alone to the people, to whom he must give an account of his stewardship, the same as must the Congress. There was opposition, however, to the repeal. Finally, when Mr. Cleveland came to be President the matter came up for final test and decision. While it is conceded here, I presume, that, technically speaking, the power does belong to the President, yet it is claimed that we may pass this resolution in the hope that it will accomplish through moral processes that which we can not accomplish, and have no right to undertake to accomplish, through legal processes.

Of course, we are passing this resolution upon the theory and in the hope that the President of the United States will accede to our resolution and dismiss Mr. Denby from office. If that be true, and if that precedent is established, it will be in the face of the Constitution, which makes the President the sole guardian of the agents upon whom he must depend to execute the laws.

I should regard it as a calamity almost equal to the calamity with which we are dealing if, through the power of the Senate, we should establish here the precedent of saying to the President whom he should dismiss from office; and if we have a weak President, a President who will yield to the Congress in this respect, through public feeling, we will have established that which the fathers never intended we should do. It may be thought justified in this case, but should it become an established practice it would be most unfortunate. I am firmly of the opinion that upon the President alone should rest the responsibility for retaining or dismissing an officer of this nature. It is in the interest of good and efficient government. . . .

MR. LAFOLLETTE. Mr. President, . . . I have listened patiently to the elaborate speeches on constitutional law which have been delivered here to show that the passage of this resolution on the part of the Senate would involve some violation of the Constitution, or some usurpation of power on the part of the Senate. And while I have admired the ingenuity with which those arguments have been presented, I have yet to hear a single reason advanced against the passage of this resolution which to my mind carries any weight whatsoever.

No Senator participating in this debate has contended that it is in the public interest to continue Mr. Denby as Secretary of the Navy. None, so far as I am advised, have denied that it would be vastly to the public interest to remove him from the position of great power and responsi-

bility he now occupies. Indeed, the most elaborate speeches made in opposition to the pending resolution rest in the last analysis upon the contention that he should be impeached rather than removed by the President.

The farthest that any Senator has gone in defending Mr. Denby, so far as I have heard, is to contend that it is open to question whether he is or is not guilty of those "high crimes and misdemeanors" which must be established under the Constitution before he can be impeached. Yet, sir, we are told that in this condition of our naval service—a service upon the intelligence and integrity of which the safety of the Nation is absolutely dependent—the Senate must remain silent and impotent no matter what the consequences of its inaction may be to the country.

Mr. President, I subscribe to no such doctrine, and I assert that such doctrine is without support in our Constitution, or in the laws of the land, or in any of the precedents of this body. On the contrary, it is the plain constitutional duty of the Senate, under the admitted facts, the undoubted facts, the undisputed facts, the statement of Secretary Denby himself, to adopt this resolution.

I shall take only a few minutes of the Senate's time to demonstrate this proposition, but I hope to demonstrate it so completely that it can never be fairly questioned again in the Senate or elsewhere.

What are the facts?

First, the President nominated and the Senate advised and consented to the appointment of Mr. Denby as Secretary of the Navy.

Second, the Senate must therefore share with the President the responsibility for Mr. Denby's official position and power and every act which he commits.

Third, by the joint action of the President and the Senate, Mr. Denby under the law, by virtue of his office, became trustee for the people of this country of great property interests, including (1) the entire Navy of the United States, its docks, navy yards, arsenals, etc.; and (2) three great naval oil reserves, Nos. 1 and 2 in California, and No. 3, known as Teapot Dome, in Wyoming. These naval oil reserves were created for, and were vital to, the operation of the Navy, which had been made as required by modern navy construction an oil-burning navy. It is common knowledge, and nowhere questioned, that oil is safest in the ground, where it can not be evaporated, or burned, or otherwise lost or destroyed.

The Navy rider amendment of June, 1920, gave to the Secretary of the Navy the power, and imposed upon him the duty, to preserve and protect the Government's oil supply contained in these great naval oil reserves. Mr. Denby could no more divest himself of his duties as the trustee of the naval oil reserves than he could divest himself of his duty

to preserve and protect the ships of the Navy, the docks, the navy yards and the arsenals. The statute which imposed upon him the duty of preserving these naval oil reserves gave him power equally to protect and preserve all the classes of property for which he was a trustee. He could no more divest himself of responsibility for one than he could divest himself of responsibility for the other. No Executive order could override the statute, which in this matter was the supreme law of the land. Under the power conferred upon the Secretary of the Navy by the rider amendment to the naval appropriation bill, adopted on June 20, he was invested, as was Secretary Daniels, with all the power necessary to protect the oil in the ground.

Fourth, Denby, almost immediately following his appointment as Secretary of the Navy, entered into a scheme with Albert B. Fall, Secretary of the Interior, whereby he proposed to turn over to Fall all power and responsibility for the naval oil reserves. His testimony and public statements show that he claims to have taken the initiative in thus surrendering his exclusive custody and trusteeship of the naval oil reserves to Fall, and in attempting to transfer to the Secretary of the Interior the most important powers and duties of his office.

It is obvious that Edwin Denby, Secretary of the Navy, could not lawfully divest himself of the trust which his great office imposed exclusively upon him. If he could delegate to Fall the powers and obligations of his office in part—of those relating to the naval oil reserves—he could delegate to Fall all the duties and all the powers of his office, and the position of Secretary of the Navy would, in effect, have been abolished. That Denby knew his action in this respect was unlawful is shown by the fact that after the lease of Teapot Dome was made by Fall, many days after, he subsequently signed the leases in an attempt to make it lawful. But Denby testified before the Public Lands Committee of the Senate in effect that it was the mind of Fall and not the mind of Denby which made the leases. The negotiations were conducted by Fall; the ranch of Fall, not the home of Denby, was the place of rendezvous with Sinclair. The hundred thousand dollars in bills so far proven to have been loaned was turned over by Doheny to Fall and not to Denby. But this does not absolve Denby.

Let me put to you a very simple illustration of the situation. Suppose a private individual is a trustee and has the possession of a great fund, which as trustee he is bound in the most solemn manner to preserve and protect for the benefit of the cestui que trust. And suppose, sir, under certain circumstances the trustee turns over to a third party the entire management and control and disposition of the trust fund, and

merely signs without question and without investigation whatever documents are presented to him by the third person for the purpose of disposing of the trust fund. And suppose that this third person to whom the trustee has turned over the trust funds unlawfully dissipates and misapplies the funds for his own personal gain and profit. There may have been nothing criminal on the part of the trustee in thus turning over the trust funds to another, although his action was certainly unlawful, yet would any court absolve the trustee from responsibility for the misapplication and loss of the trust funds? Of course not. The question answers itself. But that is not all. Any court would immediately remove from office such unfaithful trustee just as quickly as it would remove him if he had profited personally by the misapplication of the trust funds.

Now, sir, no court can remove Denby from office except a court of impeachment, and then only upon proof of high crimes and misdemeanors—and upon proof so clear and explicit that it would compel a two-thirds vote of the Senate in favor of conviction.

As a practical matter, every Senator here knows that on the evidence as it now stands Denby can not be thus convicted, and an argument that the people of this country should be relegated to the slow and uncertain and probably unsuccessful procedure by impeachment, is merely an argument for the continuance of Denby in office.

The only other method by which he can be removed, and the only practicable method by which he can be ousted, is by action of the President. And just here, sir, is where the right and the duty of the Senate arises. The Senate, by its confirmation of Edwin Denby's appointment as Secretary of the Navy, advised the President in the most solemn manner, and by the deliberate and formal action of the Senate, that it approved Denby as a fit man for the office of the Secretary of the Navy. Since that time information has come to the Senate which shows Denby, even by his own admissions, not to be a fit and trustworthy man for the office, for, mind you, Mr. President, in the very face of the shocking testimony of the payment of money to Fall by Sinclair and Doheny, Denby—intellectually and morally abnormal, as it seems to me—publicly declared that if the opportunity were offered to repeat this monstrous proceeding, that he would do the same thing again. That deliberate and shocking statement made by Edwin Denby is found in the *Congressional Record* of January 29, and also in a more elaborate statement given by him personally to the press a few days ago.

Now, of course, Senators who wish to do so may argue that in this situation they have no duty to perform relative to Secretary Denby's

further continuance in this responsible office. They may argue, if they choose, that it is an invasion of the President's prerogatives for the Senate to advise the President that it no longer believes Denby to be fit man for the office to which the Senate confirmed him, and therefore that it has become the sense of the Senate that the resignation of Secretary Denby should be requested.

But, sir, so far from being an invasion of the President's prerogative, I submit that common honesty and the purpose of the Senate to keep its own hands clean requires that it should certify to the President its conviction that Edwin Denby is unfit to hold the office of Secretary of the Navy and to urge that his resignation be requested.

But why this sudden tenderness for the President's prerogatives? On the 29th day of last January this Senate passed a resolution, and every Senator opposing the pending resolution voted for it, which resolved "that the President of the United States be, and he hereby is, authorized and directed immediately to cause suit to be instituted and prosecuted for the annulment and cancellation of these leases," and "to enjoin the further extraction of oil from said reserves," and "to prosecute such other action or proceedings, civil and criminal, as may be warranted by the facts in relation to the making of said leases."

Under the Constitution of the United States, the duty of enforcing the laws of the United States rests with the President, and not with the Senate. It was the President's prerogative, if you please, to determine whether any action, civil or criminal, should be prosecuted. But that is not all. That same resolution had written into it a provision taking the prosecution out of the hands of Attorney General, and placing it in the hands of special counsel. That was a further interference with the prerogatives of the President.

In enforcing the laws, civil or criminal, the Senate does not under the Constitution divide the responsibility with the President, as it does in making appointments to Cabinet positions. The right of the Senate to petition the President to request Mr. Denby's resignation rests upon solid constitutional basis, since for his appointment the Senate was responsible equally with the President. But for directing the President to enforce the law by civil and criminal prosecutions, and for directing him to appoint special prosecutors for that purpose, no such authority can be claimed. Yet, sir, every Senator present went on record in favor of the resolution of January 29. No Senator, therefore, who supported that resolution can, it seems to me, logically oppose the pending one on the ground that it infringes upon the President's prerogatives or assumes a power which the Senate does not possess.



Not once but many times has the Senate called upon the Executive to take action in matters wherein the final decision rests solely with the President. The Constitution of the United States provides:

The President shall be the Commander in Chief of the Army and Navy of the United States.

He alone is authorized to direct the naval and military forces of the land thus explicitly placed under his command by the Constitution.

Yet we all know that within a few months the Senate, by resolution, requested the President to withdraw our troops from Germany. Here was a matter placed under the exclusive control of the President by the express terms of the Constitution. Yet, sir, the Senators who are to-day foremost in opposing the pending resolution as an invasion of the President's prerogatives were the most insistent in demanding the passage of a resolution requesting the President, as Commander in Chief of the Army and the Navy, to remove our military forces from German territory.

In the face of these and many other precedents which have been cited it is simply idle to argue that there is any constitutional or legal objection to the adoption of this resolution.

### c. Statement of President Coolidge, February 11, 1924

[*Congressional Record*, vol. 65, p. 2335.]

No official recognition can be given to the passage of the Senate resolution relative to their opinion concerning members of the Cabinet or other officers under Executive control.

As soon as special counsel can advise me as to the legality of these leases and assemble for me the pertinent facts in the various transactions, I shall take such action as seems essential for the full protection of the public interest. I shall not hesitate to call for the resignation of any official whose conduct in this matter in any way warrants such action upon my part. The dismissal of an officer of the Government, such as is involved in this case, other than by impeachment, is exclusively an executive function. I regard this as a vital principle of our Government.

In discussing this principle, Mr. Madison has well said:

"It is laid down in most of the constitutions or bills of rights in the republics of America: It is to be found in the political writings of the most celebrated civilians, and is everywhere held as essential to the preservation of liberty, that the three great departments of government be kept separate and distinct."



President Cleveland likewise stated the correct principle in discussing requests and demands made by the Senate upon him and upon different departments of the Government in which he said:

"They assume the right of the Senate to sit in judgment upon the exercise of my exclusive discretion and an executive function, for which I am solely responsible to the people from whom I have so lately received the sacred trust of office.

"My oath to support and defend the Constitution, my duty to the people who have chosen me to execute the powers of their great office and not to relinquish them, and my duty to the Chief Magistracy, which I must preserve unimpaired in all its dignity and vigor, compel me to refuse compliance with these demands."

The President is responsible to the people for his conduct relative to the retention or dismissal of public officials. I assume that responsibility and the people may be assured that as soon as I can be advised so that I may act with entire justice to all parties concerned and fully protect the public interests, I shall act.

I do not propose to sacrifice any innocent man for my own welfare, nor do I propose to retain in office any unfit man for my own welfare. I shall try to maintain the functions of the government unimpaired, to act upon the evidence and the law as I find it, and to deal thoroughly and summarily with every kind of wrong doing.

In the meantime, such steps have been taken and are being taken as fully to protect the public interests.

#### d. Resignation of Secretary Denby

[*N. Y. Times*, Feb. 19, 1924.]

THE SECRETARY OF THE NAVY,  
WASHINGTON.

Feb. 17, 1924.

My dear Mr. President:

Heretofore I have verbally expressed to you my deep appreciation of your strong message in regard to the Robinson Resolution.

No one appreciates better than I how difficult your situation has become. I fear that my continuance in the Cabinet would increase your embarrassments. Therefore, I have the honor to tender my resignation as Secretary of the Navy.

As there are a few pending matters which should receive my personal attention, I suggest that my resignation be accepted as of the date of March 10, 1924.

It will always be a gratifying thought to me that neither you nor any one else has at any time advised me to resign.

I assure you again of my appreciation of the many courtesies you have shown me and of your last great act in refusing to accede to the demand of the Senate that you ask my resignation.

With cordial regards to you and Mrs. Coolidge, and best wishes, always, I am

Very sincerely yours,

EDWIN DENBY

THE WHITE HOUSE,  
WASHINGTON.

Feb. 18, 1924.

My dear Mr. Secretary:

Your resignation has been received. I am conscious that you have tendered it from a sense of public duty. It is with great regret that I am to part with you. You will go with the knowledge that your honesty and integrity have not been impugned. I treasure and reciprocate your expressions of friendship. I shall remember the fine sense of loyalty which you have always exhibited toward me with much satisfaction and always wish to you and yours contentment and success.

Very truly yours,

CALVIN COOLIDGE.

## 64. THE VICE PRESIDENT AND THE CABINET

The custom that the Cabinet should consist only of the heads of the executive departments has become so regular as to be considered almost a constitutional requirement. Nevertheless, it has often been suggested that the Vice President, at least, be made an additional member of the Cabinet, as a "minister without portfolio," in order to put him more actively in touch with the administration which he might be called upon to conduct. President Washington frequently sought the written advice of Vice President Adams, and on at least one occasion asked him to sit with the Cabinet. Adams himself, as President, was apparently favorable to the idea of inviting Vice President Jefferson into the Cabinet, even though his political opponent. Other Presidents, notably Jackson, Taylor, and McKinley, relied frequently upon the advice of their Vice Presidents—Van Buren, Fillmore, and Hobart, respectively. Vice President Marshall presided over meetings of the Cabinet during President Wilson's absence in Europe, Vice President Coolidge sat regularly with the Cabinet during the administration of President Harding, Vice President Curtis during the administration of President Hoover, and Vice President Garner during the administration of President Roosevelt.

## a. View of Jefferson

[Jefferson to Madison, Jan. 22, 1797. *Writings of Thomas Jefferson* (Ford ed., published by G. P. Putnam's Sons), vol. VII, pp. 107-108.]

My letters inform me that Mr. A. (Adams) speaks of me with great friendship, and with satisfaction in the prospect of administering the government in concurrence with me. I am glad of the first information, because though I saw that our ancient friendship was affected by a little leaven, produced partly by his constitution, partly by the contrivance of others, yet I never felt a diminution of confidence in his integrity, and retained a solid affection for him. His principles of government I knew to be changed, but conscientiously changed. As to my participating in the administration, if by that he meant the executive cabinet, both duty & inclination will shut that door to me. I cannot have a wish to see the scenes of '93. revived as to myself, and to descend daily into the arena like a gladiator, to suffer martyrdom in every conflict. As to duty, the constitution will know me only as the member of a legislative body; and its principle is, that of a separation of legislative, executive and judiciary functions, except in cases specified. If this principle be not expressed in direct terms, yet it is clearly the spirit of the constitution, & it ought to be so commented and acted on by every friend of free government.

## b. View of Bryan

[*The Commoner*, Nov., 1920.]

In view of Senator Harding's announcement that Vice-President Coolidge will have a place at the President's council table, *The Commoner* reproduces from the first page of its first issue, January 23, 1901, the following:

"It has been intimated that Vice-President-Elect Roosevelt is desirous of receiving more consideration at the hands of the President than has, as a rule, been given to those occupying his position. Whether or not the report is true is not material, but the ambition, if he does entertain it, is an entirely worthy one.

"Why has the Vice-President been so generally ignored by the Chief Executive in the past? It is said that Mr. Breckenridge was only consulted once by President Buchanan, and then only in regard to the phraseology of a Thanksgiving Proclamation. This incident was related to a later Vice-President who was noted for his skill at repartee, and he replied, with a twinkle in his eye: 'Well, there is one more Thanksgiving Day before my term expires.'

"According to the constitution the Vice-President succeeds to the office in case the President dies, resigns, is removed, or becomes unable to discharge the duties of the office. The public good requires that he should be thoroughly informed as to the details of the administration and ready to take up the work of the Executive at a moment's notice. The Vice-President ought to be ex-officio a member of the President's cabinet; he ought to sit next to the President in the council chamber. Receiving his nomination from a national convention and his commission from the people, he is able to furnish the highest possible proof that he enjoys public respect and confidence, and the President should avail himself of the wisdom and discretion of such an advisor. While the responsibility for action rests upon the occupant of the White House he is entitled to, and of course desires, all the light possible before deciding on any question.

"Congress can by law impose upon the Vice-President the duty of giving such assistance to his chief, or the President can of his own volition establish the precedent, and it would, in all probability, be observed by his successors.

"Many public men have avoided the second place on the ticket for fear it would relegate them to obscurity; some of Colonel Roosevelt's friends objected to his nomination on that ground. A cabinet position has generally been considered more desirable than the Vice-Presidency, but the latter in dignity and importance is, in fact, only second to the presidency, and the occupant deserves the prominence and prestige which would come from more intimate official association with the Executive."

### **c. View of Vice President Marshall**

[Interview in *N. Y. Times*, Dec. 5, 1920.]

The Constitution of the United States intended that the Vice President should be the presiding officer of the Senate and nothing else. To be a presiding officer it is necessary that the Vice President shall have the entire confidence of all the Senators. If a Vice President should attend meetings of the Cabinet practically as a member, it would tend to arouse suspicion, and Senators of the minority party might not trust him. This would make the path of the Vice President in the Senate a rough one.

If any representatives from the Capitol are to attend Cabinet meetings, the majority leader of the Senate and the majority leader of the House should be the men selected.

The idea that a Vice President should be completely informed as to the policies of the President so that he might carry them out in the event of the President's death, is to my mind fallacious. A Vice President might make a poor President, but he would make a much poorer one if he attempted to subordinate his own mind and views to carry out the ideas of a dead man.

#### d. View of Vice President Dawes

[Arthur Sears Henning, in *Chicago Tribune*, Nov. 27, 1924.]

General Charles G. Dawes, Vice President Elect, has started speculation among politicians by the remark he made to President Coolidge that he does not care to sit with the cabinet while occupying the Vice Presidential office.

President Harding created the precedent by inviting Mr. Coolidge to sit with the cabinet regularly, thinking it would be valuable for the cabinet to have the advice of the Vice President and that the Vice President should be thoroughly informed on administrative matters against the time when he might be called upon to discharge the duties of President, as Mr. Coolidge was called upon to do two years later.

The general supposition here has been that the precedent would be observed in the future. Now, it appears that President Coolidge is disposed to acquiesce in the attitude of the Vice President-elect.

Some Republican politicians are of the idea that General Dawes is thinking he may be a candidate for President in 1928 and does not care to identify himself more than is necessary with the Coolidge administration and give approval, even by his mere presence in the cabinet meetings, to Coolidge administration policies which may be under fire within the party by the time the presidential primaries are held.

It might be that in 1928 Vice President Dawes would stand forth as the logical leader of the opposition to Coolidge policies and as the candidate of that opposition for the nomination for President. Under such circumstances it might prove embarrassing to his candidacy if the policies under fire were adopted at cabinet sessions which he attended and continued to attend.

It is known that many friends of General Dawes are hoping that he will be the nominee in 1928. Hence the politicians think they have some justification for their theory. The assumption is that President Coolidge will be a candidate for renomination, in which event General Dawes, if he was determined also to be a candidate, would be pitted against the head of the administration with which he would be identified if he were to sit regularly in the cabinet.



There is also considerable speculation on the further disclosure that President Coolidge, when discussing the matter with Mr. Dawes at Plymouth, Vt., last summer, did not urge the general to reconsider his decision not to sit with the cabinet.

One suggestion heard is that the President would not feel comfortable with a personality of the Hell Maria type participating in the sessions and jazzing up the deliberations of the elder statesmen with pungently expressed opinions.

Then, too, General Dawes is the sort of man who would not acquiesce in policies of which he disapproved and he would not be unlikely to walk out on a cabinet session almost any time, announcing he was done with the whole business. That would create talk, if not scandal, and probably make Dawes a candidate for President on the spot.

Another theory is that President Coolidge was not favorably impressed by his own experience with the value of the participation of the Vice President in these sessions. He once told a friend that participation of the Vice President in the cabinet would work out satisfactorily all around provided the Vice President belonged to the same wing of the party as the President. Otherwise friction would be created.

If what General Dawes fears is becoming entangled in administration policies which he does not approve, he has good ground for that position. The single unfortunate experience of Mr. Coolidge as Vice President in participating in cabinet meetings arose from the charge, aired in the recent election, that he had given tacit approval to the handing over of the navy oil reserves to private exploitation. Mr. Coolidge always maintained that he never heard the oil matter discussed in the cabinet.

## 65. THE CABINET AND CONGRESS

The chief distinguishing characteristic of European governments is the so-called "parliamentary" or "cabinet system," that is, the principle that the heads of the administrative departments who make up the cabinet, shall be selected from the members of parliament and continue to serve in both capacities so long as they are supported by a majority of parliament. There is thus a very close union between the legislative and executive departments of government, and the heads of the latter function actively as leaders of the former. In the United States both custom and constitutional provision have established instead the principle of separation of powers, in accordance with which the President and his Cabinet function independently of Congress. On occasion, members of either house are selected for Cabinet posts, but are then required to resign their seats in Congress, and more often Cabinet members have had no congressional experience at all. Since both Congress and the Executive are concerned with the work and problems of administration, many have felt that closer relations ought to be established by admitting



members of the Cabinet to seats in either house, and thus approximating the European system to some extent. The character of these proposals and the manner in which they might be accomplished are indicated by the following.

a. Message of President Taft

[*Congressional Record*, vol. 49, pt. 1, pp. 895-896.]

*To the Senate and House of Representatives:*

This is the third of a series of messages in which I have brought the attention of the Congress the important transactions of the Government in each of its departments during the last year and have discussed needed reforms.

I recommend the adoption of legislation which shall make it the duty of heads of departments—the members of the President's Cabinet—to find convenient times to attend the session of the House and the Senate which shall provide seats for them in each House, and give them the opportunity to take part in all discussions and to answer questions on which they have had due notice. The rigid holding apart of the executive and the legislative branches of this Government has not worked for the great advantage of either. There has been much lost motion in the machinery, due to the lack of cooperation and interchange of view face to face between the representatives of the Executive and the Members of the two legislative branches of the Government. It was never intended that they should be separated in the sense of not being in constant effective touch and relationship to each other. The legislative and the executive each performs its own appropriate function, but these functions must be coordinated. Time and time again debates have arisen in each House upon issues which the information of a particular department head would have enabled him, if present, to end at once by a simple explanation or statement. Time and time again a forceful and earnest presentation of facts and arguments by the representative of the Executive whose duty it is to enforce the law would have brought about a useful reform by amendment, which in the absence of such a statement has failed of passage. I do not think I am mistaken in saying that the presence of the members of the Cabinet on the floor of each House would greatly contribute to the enactment of beneficial legislation. Nor would this in any degree deprive either the legislative or the executive of the independence which separation of the two branches has been intended to promote. It would only facilitate their cooperation in the public interest.

On the other hand, I am sure that the necessity and duty imposed upon department heads of appearing in each House and in answer to searching questions, of rendering upon their feet an account of what they have

done, or what has been done by the administration, will spur each member of the Cabinet to closer attention to the details of his department, to greater familiarity with its needs, and to greater care to avoid the just criticism which the answers brought out in questions put and discussions arising between the Members of either House and the members of the Cabinet may properly evoke.

Objection is made that the members of the administration having no vote could exercise no power on the floor of the House, and could not assume that attitude of authority and control which the English parliamentary Government have and which enables them to meet the responsibilities the English system thrusts upon them. I agree that in certain respects it would be more satisfactory if members of the Cabinet could at the same time be Members of both Houses, with voting power, but this is impossible under our system; and while a lack of this feature may detract from the influence of the department chiefs, it will not prevent the good results which I have described above both in the matter of legislation and in the matter of administration. The enactment of such a law would be quite within the power of Congress without constitutional amendment, and it has such possibilities of usefulness that we might well make the experiment, and if we are disappointed the misstep can be easily retraced by a repeal of the enabling legislation.

This is not a new proposition. In the House of Representatives, in the Thirty-eighth Congress, the proposition was referred to a select committee of seven Members. The committee made an extensive report and urged the adoption of the reform. The report showed that our history had not been without illustration of the necessity and the examples of the practice by pointing out that in early days Secretaries were repeatedly called to the presence of either House for consultation, advice, and information. It also referred to remarks of Mr. Justice Story in his *Commentaries on the Constitution*, in which he urgently presented the wisdom of such a change. This report is to be found in Volume I of the *Reports of Committees of the First Session of the Thirty-eighth Congress*, April 6, 1864.

Again, on February 4, 1881, a select committee of the Senate recommended the passage of a similar bill, and made a report, in which, while approving the separation of the three branches, the executive, legislative, and judicial, they point out as a reason for the proposed change that, although having a separate existence, the branches are "to cooperate, each with the other, as the different members of the human body must cooperate with each other in order to form the figure and perform the duties of a perfect man." . . .

It would be difficult to mention the names of higher authority in the practical knowledge of our Government than those which are appended to this report. . . .

WILLIAM H. TAFT.

The White House, December 19, 1912.

#### b. Couzens Bill, 1926

[S. 3406, 69th Congress, 1st Session.]

#### IN THE SENATE OF THE UNITED STATES

March 3 (calendar day, March 4), 1926

MR. COUZENS introduced the following bill;<sup>1</sup> which was read twice and referred to the Committee on Rules.

#### A BILL

Granting privilege of the floor and right to participate in debate to heads of executive departments and other officers.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the Secretary of State, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, the Secretary of Agriculture, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Labor, the Attorney General, the Postmaster General, the governor of the Federal Reserve Board, the chairman of the United States Tariff Commission, the chairman of the Federal Trade Commission, the chairman of the Interstate Commerce Commission, the chairman of the Civil Service Commission, or the duly appointed representatives of such officials, shall be entitled to occupy seats on the floor of the Senate and the House of Representatives, with the right to participate in debate on matters relating to the business of their respective departments, under such rules as may be prescribed by the Senate and House, respectively.

SEC. 2. That the said secretaries and officers, the Attorney General, and the Postmaster General, or the duly appointed representatives of such officials, shall attend the sessions of the Senate on the opening of the sittings on Wednesday of each week, and the sessions of the House of Representatives on the opening of the sittings on Monday of each week, to give information asked by resolution or in reply to questions which may be propounded to them under the rules of the Senate and House; and the Senate and House may, by standing order, dispense with the attendance of one or more of said officers on either of said days.

<sup>1</sup> Similar bills have been introduced on numerous occasions since.

## CHAPTER XI

### THE ADMINISTRATION AND THE CIVIL SERVICE

#### 66. THE PRESIDENT AND THE ADMINISTRATION

The President is by the Constitution vested with the executive power and with the general enforcement of the laws. It is Congress, however, that creates and maintains the numerous administrative offices of whatever grade, and that prescribes the functions of these offices. The question has therefore arisen of the exact relationship between the President and the other officers in the national administrative system, and the extent to which he may control their conduct. This question became especially acute in connection with the relations of President Jackson to the Second United States Bank, which was established by Congress in 1816.

It was provided that government funds were to be deposited in that Bank or its branches, unless the Secretary of the Treasury should otherwise direct, in which case the reasons for removal were to be reported to Congress. A bill to recharter the Bank was passed in July, 1832, and promptly vetoed by President Jackson. Being re-elected in the campaign that followed, the President felt himself supported in his desire to crush the Bank, and in 1833, directed his Secretary of the Treasury to remove the government deposits and place them in selected state banks. Secretary McLane being opposed to the policy of removal and feeling himself, rather than the President, responsible under the act, refused to obey the President's order and was transferred to the State Department. The new Secretary of the Treasury, William J. Duane, likewise refused to remove the deposits and was summarily dismissed. Attorney General Roger B. Taney was thereupon appointed Secretary of the Treasury, and promptly carried out the President's directions, Jackson thus effectually destroying the Bank even before the expiration of its charter. The Senate refused to confirm Taney's appointment, and adopted a resolution censuring the President for what it considered his arbitrary and unlawful action, a resolution to which Jackson responded with a vigorous defense of his policy, and which was later (in 1837) expunged from the Senate Journal.

[Protest of President Jackson against Senate Resolution of Censure, April 15, 1834. Richardson, *Messages and Papers of the Presidents*, vol. III, pp. 83-85.]

. . . . .

The Congress of the United States have never passed an act imperatively directing that the public moneys shall be kept in any particular place or places. From the origin of the Government to the year 1816 the statute book was wholly silent on the subject. In 1789 a Treasurer



was created, subordinate to the Secretary of the Treasury, and through him to the President. He was required to give bond safely to keep and faithfully to disburse the public moneys, without any direction as to the manner or places in which they should be kept. By reference to the practice of the Government it is found that from its first organization the Secretary of the Treasury, acting under the supervision of the President, designated the places in which the public moneys should be kept, and especially directed all transfers from place to place. This practice was continued, with the silent acquiescence of Congress, from 1789 down to 1816, and although many banks were selected and discharged, and although a portion of the moneys were first placed in the State banks, and then in the former Bank of the United States, and upon the dissolution of that were again transferred to the State banks, no legislation was thought necessary by Congress, and all the operations were originated and perfected by Executive authority. The Secretary of the Treasury, responsible to the President, and with his approbation, made contracts and arrangements in relation to the whole subject-matter, which was thus entirely committed to the direction of the President under his responsibilities to the American people and to those who were authorized to impeach and punish him for any breach of this important trust.

The act of 1816 establishing the Bank of the United States directed the deposits of public money to be made in that bank and its branches in places in which the said bank and branches thereof may be established, "unless the Secretary of the Treasury should otherwise order and direct," in which event he was required to give his reasons to Congress. This was but a continuation of his preexisting power as the head of an Executive Department to direct where the deposits should be made, with the superadded obligation of giving his reasons to Congress for making them elsewhere than in the Bank of the United States and its branches. It is not to be considered that this provision in any degree altered the relation between the Secretary of the Treasury and the President as the responsible head of the executive department, or released the latter from his constitutional obligation to "take care that the laws be faithfully executed." On the contrary, it increased his responsibilities by adding another to the long list of laws which it was his duty to carry into effect.

It would be an extraordinary result if because the person charged by law with a public duty is one of his Secretaries it were less the duty of the President to see that law faithfully executed than other laws enjoining duties upon subordinate officers or private citizens. If there be any difference, it would seem that the obligation is the stronger in relation to

the former, because the neglect is in his presence and the remedy at hand.

It can not be doubted that it was the legal duty of the Secretary of the Treasury to order and direct the deposits of the public money to be made elsewhere than in the Bank of the United States *whenever sufficient reasons existed for making the change*. If in such a case he neglected or refused to act, he would neglect or refuse to execute the law. What would be the sworn duty of the President? Could he say that the Constitution did not bind him to see the law faithfully executed because it was one of his Secretaries and not himself upon whom the service was specially imposed? Might he not be asked whether there was any such limitation to his obligations prescribed in the Constitution? Whether he is not equally bound to take care that the laws be faithfully executed, whether they impose duties on the highest officer of State or the lowest subordinate in any of the Departments? Might he not be told that it was for the sole purpose of causing all executive officers, from the highest to the lowest, faithfully to perform the services required of them by law that the people of the United States have made him their Chief Magistrate and the Constitution has clothed him with the entire executive power of this Government? The principles implied in these questions appear too plain to need elucidation.

But here also we have a contemporaneous construction of the act which shows that it was not understood as in any way changing the relations between the President and Secretary of the Treasury, or as placing the latter out of Executive control even in relation to the deposits of the public money. Nor on that point are we left to any equivocal testimony. The documents of the Treasury Department show that the Secretary of the Treasury did apply to the President and obtained his approbation and sanction to the original transfer of the public deposits to the present Bank of the United States, and did carry the measure into effect in obedience to his decision. They also show that transfers of the public deposits from the branches of the Bank of the United States to State banks at Chillicothe, Cincinnati, and Louisville, in 1819, were made with the approbation of the President and by his authority. They show that upon all important questions appertaining to his Department, whether they related to the public deposits or other matters, it was the constant practice of the Secretary of the Treasury to obtain for his acts the approval and sanction of the President. These acts and the principles on which they were founded were known to all the departments of the Government, to Congress and the country, and until very recently appear never to have been called in question.



Thus was it settled by the Constitution, the laws, and the whole practice of the Government that the entire executive power is vested in the President of the United States; that as incident to that power the right of appointing and removing those officers who are to aid him in the execution of the laws, with such restrictions only as the Constitution prescribes, is vested in the President; that the Secretary of the Treasury is one of those officers; that the custody of the public property and money is an Executive function which, in relation to the money, has always been exercised through the Secretary of the Treasury and his subordinates; that in the performance of these duties he is subject to the supervision and control of the President, and in all important measures having relation to them consults the Chief Magistrate and obtains his approval and sanction; that the law establishing the bank did not, as it could not, change the relation between the President and the Secretary—did not release the former from his obligation to see the law faithfully executed nor the latter from the President's supervision and control; that afterwards and before the Secretary did in fact consult and obtain the sanction of the President to transfers and removals of the public deposits, and that all departments of the Government, and the nation itself, approved or acquiesced in these acts and principles as in strict conformity with our Constitution and laws. . . .

ANDREW JACKSON.

## 67. CONGRESSIONAL INVESTIGATIONS

Just as the President may use his power of removal to ensure the carrying out of his policies, so Congress, through its power of impeachment, may exercise a measure of control over the executive and administrative officers. Impeachment is, however, a clumsy device, ineffective except for the most flagrant derelictions from duty or abuses of power, and does not serve as a continuing check on the administration. Hence committees of either house have from time to time been authorized to investigate the conduct of the various administrative agencies, and by the questioning of officials concerned, by the revelation of laxity or misconduct, by the mere application of publicity and criticism, have exercised a very considerable influence over administrative policy and methods. These investigations have been especially numerous of recent years, the most notable being that by a Senate committee into the oil land leases of the Harding administration, which served to reveal the frauds in connection with such leases and ultimately to restore the congressional policy of oil conservation. It is charged by some, however, that such investigations are often of a partisan character, designed merely to annoy and hamper the executive branch, and that they are quite outside the proper jurisdiction of Congress. The discussions of the purpose and value of this practice deserve the most careful attention.

**a. Letter of Secretary Mellon to President Coolidge**

[*Congressional Record*, vol. 65, pp. 6087-6088.]

The Secretary of the Treasury,  
Washington, April 10, 1924.

Dear Mr. President:

On March 12, 1924, by Senate resolution 168, the Senate appointed a special committee to investigate the Bureau of Internal Revenue and suggest corrective legislation. Senator Couzens was the moving spirit of the resolution. In urging the appointment of the committee, his purpose was ostensibly to obtain information upon which to recommend to the Senate constructive reforms in law and in administration. With such a purpose I am entirely in accord.

From the line of investigation selected by Senator Couzens and by the atmosphere which he has seen fit to inject into the inquiry, it is now obvious that his sole purpose is to vent some personal grievance against me. All companies in which I have been interested have been sought out. I have aided in obtaining from them the waiver of their right to privacy and in the delivery of their income tax returns in complete detail to the committee.

This investigation has disclosed that no company in which I have been interested has received any different or better treatment than any other taxpayer. The inquiry, so far as showing that I favored my own interests, has failed completely. Any constructive purpose of the committee has now been abandoned.

At a meeting of the committee yesterday Senator Couzens carried a resolution, against the objection of the two Republican members, empowering Francis J. Heney to assume charge of the investigation and to conduct the examination of witnesses, with the understanding, expressly stated in the resolution, that neither the committee nor the Government pay Heney's compensation. In effect, a private individual is authorized to investigate the Government. This individual is paid by, not the Senate or its committee, but by Senator Couzens alone.

As Secretary of the Treasury I have charge of the finances of the nation. The Treasury touches directly or indirectly every person, and in the sound conduct of its business affects the industrial life of the United States. Already the present investigation has greatly injured the efficiency of the income tax organization, and the sufferer is not the Government, but every taxpayer. Attacks such as these seriously impair the morale of the 60,000 employes of the department throughout the country.

Government business cannot continue to be conducted under frequent interference by investigations of the Congress, entirely destructive in their character. If the interposition of private resources be permitted to interfere with the executive administration of Government, the machinery of Government will cease to function.

I owe to you and to the people of the United States the duty to see that the Treasury conducts efficiently and faithfully the great tasks continuously presented to it, that its integrity be preserved, and that its future be insured.\* When through unnecessary interference the proper exercise of this duty is rendered impossible, I must advise you that neither I nor any other man of character can longer take responsibility for the Treasury. Government by investigation is not government.

Faithfully yours,

A. W. MELLON.

Secretary of the Treasury.

The President,  
The White House.

#### **b. Message of President Coolidge to the Senate**

[*Congressional Record*, vol. 65, p. 6087.]

To the Senate:

Herewith is a copy of a letter from the Secretary of the Treasury, the Hon. Andrew W. Mellon, to me, which I feel constrained to transmit to the Senate for its information. Also a copy of the resolution adopted by the committee investigating the Bureau of Internal Revenue. This is done because it seems incredible that the Senate of the United States would knowingly approve the past and proposed conduct of one of its committees, which this letter reveals.

There exists, and always should exist, every possible comity between the executive departments and the Senate. Whatever may be necessary for the information of the Senate or any of its committees, in order to enable them to perform their legislative or other constitutional functions, ought always to be furnished willingly and expeditiously by any department.

The executive branch has nothing that it would wish to conceal from any legitimate inquiry on the part of the Senate. But it is recognized both by law and by custom that there is certain confidential information which it would be detrimental to the public service to reveal. Such in-

\* This has been my sole thought as head of this department.

formation as can be disclosed, I shall always unhesitatingly direct to be laid before the Senate. I recognize also that it is perfectly legitimate for the Senate to indulge in political discussions and partisan criticism.

The Senate resolution appointing this committee is not drawn in terms which purport to give any authority to the committee to delegate their authority, or to employ agents and attorneys. The appointment of an agent and attorney to act in behalf of the United States, but to be paid by some other source than the public Treasury, is in conflict with the spirit of Section 1764 of the Revised Statutes, the Act of March 3, 1917.

The constitutional and legal rights of the Senate ought to be maintained at all times. Also the same must be said of the executive departments. But these rights ought not to be used as a subterfuge to cover unwarranted intrusion. It is the duty of the Executive to resist such intrusion and to bring to the attention of the Senate its serious consequences. That I shall do in this instance.

Under a procedure of this kind, the constitutional guarantees against unwarranted search and seizure break down, the prohibition against what amounts to a Government charge of criminal action without the formal presentment of a Grand Jury is evaded, the rules of evidence which have been adopted for the protection of the innocent are ignored, the department becomes the victim of vague, unformulated and indefinite charges, and instead of a Government of law we have a Government of lawlessness.

Against the continuance of such a condition, I enter my solemn protest, and give notice that in my opinion the department ought not to be required to participate in it. If it is to be continued, if the Government is to be thrown into disorder by it, the responsibility for it must rest on those who are undertaking it. It is time that we return to a Government under and in accordance with the usual forms of the law of the land. The state of the Union requires the immediate adoption of such a course.

CALVIN COOLIDGE.

The White House, April 11, 1924.

### c. Power of Investigation

[*McGrain v. Daugherty* (1927), 273 U. S. 135, 174-178; 71 L. Ed. 580, 593-594.]

Mr. Justice Van Devanter delivered the opinion of the court. . . .

[Having just made an exhaustive review of the previous practices and decisions, Justice Van Devanter continued:]



We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified. Both Houses of Congress took this view of it early in their history—the House of Representatives with the approving votes of Mr. Madison and other members whose service in the convention which framed the Constitution gives special significance to their action—and both houses have employed the power accordingly up to the present time. The Acts of 1798 and 1857, judged by their comprehensive terms, were intended to recognize the existence of this power in both houses and to enable them to employ it “more effectually” than before. So, when their practice in the matter is appraised according to the circumstances in which it was begun and to those in which it has continued, it falls nothing short of a practical construction, long continued, of the constitutional provisions respecting their powers, and therefore should be taken as fixing the meaning of those provisions, if otherwise doubtful.

We are further of opinion that the provisions are not of doubtful meaning, but, as was held by this court in the cases we have reviewed, are intended to be effectively exercised, and therefore to carry with them such auxiliary powers as are necessary and appropriate to that end. While the power to exact information in aid of the legislative function was not involved in those cases, the rule of interpretation applied there is applicable here. A legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change; and where the legislative body does not itself possess the requisite information—which not infrequently is true—recourse must be had to others who do possess it. Experience has taught that mere requests for such information often are unavailing, and also that information which is volunteered is not always accurate or complete; so some means of compulsion are essential to obtain what is needed. All this was true before and when the Constitution was framed and adopted. In that period the power of inquiry—with enforcing process—was regarded and employed as a necessary and appropriate attribute of the power to legislate—indeed, was treated as inhering in it. Thus there is ample warrant for thinking, as we do, that the constitutional provisions which commit the legislative function to the two houses are intended to include this attribute to the end that the function may effectively be exercised.

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted.

If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decision in *Kilbourn v. Thompson* and *Re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry. . . .

It is quite true that the resolution directing the investigation does not in terms avow that it is intended to be in aid of legislation; but it does show that the subject to be investigated was the administration of the Department of Justice—whether its functions were being properly discharged or were being neglected or misdirected, and particularly whether the Attorney General and his assistants were performing or neglecting their duties in respect of the institution and prosecution of proceedings to punish crimes and enforce appropriate remedies against the wrongdoers—specific instances of alleged neglect being recited. Plainly the subject was one on which legislation could be had and would be materially aided by the information which the investigation was calculated to elicit. This becomes manifest when it is reflected that the functions of the Department of Justice, the powers and duties of the Attorney General and the duties of his assistants, are all subject to regulation by congressional legislation, and that the department is maintained and its activities are carried on under such appropriations as in the judgment of Congress are needed from year to year. . . .

## 68. CONTROL OF ADMINISTRATIVE COMMISSIONS

The President is considered to be the head of the national administrative system, and has the power to appoint and remove all important administrative officers, including the members of the administrative boards or commissions. The character of these commissions and the conditions imposed by Congress with respect to their composition have, however, led to the general assumption that these were intended to be largely independent of the Executive, to be representative rather of a diversity of interests, and to be guided in their policies perhaps more by Congress than by the President. Such strong Presidents as Theodore Roosevelt and Wilson apparently made little effort to bring these commissions under their control, leaving the members free, following their appointment, to determine policies for themselves. Of recent years, however, and notably during the administrations of Presidents Coolidge and F. D. Roosevelt, the view that the President had the right to guide



the policies and conduct even of these commissions began to be asserted, and attempts made to bring about such control.

### a. Appointment of David J. Lewis to Tariff Commission

[Letter of Commissioner Culbertson to Commissioner Costigan, in *Congressional Record*, vol. 67, pp. 2187-2189.]

United States Tariff Commission  
William F. Culbertson, Vice Chairman

Washington, September 9, 1924.

MY DEAR COSTIGAN: You will perhaps have seen to-day in the press that Mr. Lewis was reappointed yesterday. I reached Washington Sunday evening and had not been in my office very long Monday morning before I was sent for by the President. The result of my interview is covered by a memorandum, a copy of which I inclose.

When I returned to the office I took the President's suggestions up with Lewis, and later he reached the decision that he would not write the letter of resignation requested by the President. He, however, went to see the President during the afternoon, and I presume he will write you the details of what took place. In general this is what happened—

He went into the President's office, and the President had before him the commission. He took up his pen and signed it in Lewis's presence. He then turned to Lewis and asked him whether he had "that letter." Lewis then explained that he did not feel free to furnish the President with the letter which he requested. Lewis said that the President was visibly disturbed and said with a little heat that it did not make any difference anyway; that the position would be held only at the pleasure of the President. Lewis then said to the President that only the two of them knew that the commission was signed, and he suggested that the President was at liberty to destroy the commission. The President, however, did not respond to this suggestion, and Lewis left the President's office with his commission. A little later he was sworn in.

Thus ends another curious chapter in the Tariff Commission's history. It indicates clearly, I think, that there is a line beyond which the President will not go in opposing the principles for which the three of us have stood in the development of the Tariff Commission.

We miss your counsels very much, but I suggest that you stay in the Colorado climate until you are certain that your return here will not bring with [*sic*] a return of your hay fever.

Very cordially yours,

CULBERTSON.

HON EDWARD P. COSTIGAN,  
*Palmer Lake, Colo.*

[Enclosure]

Contemporary memorandum of the interview with the President, September 8, 1924:

Shortly after I reached my office this morning—about 9:30—I received a request over the telephone to come to the White House to see the President. I went over immediately. The President was reasonably cordial. He began by saying that the subject of the interview was Mr. Lewis's reappointment. Mr. Lewis's term as a member of the Tariff Commission expired yesterday. The President stated that he intended to reappoint Mr. Lewis but that he desired that Mr. Lewis prepare and give to him a letter of resignation as a member of the Tariff Commission. At first I did not fully comprehend the nature of this request.

I spoke of Mr. Lewis's term having already expired. Then the President explained that he wanted Mr. Lewis to submit his resignation under the new commission to be effective in case he (the President) desired at any time in the future to accept it.

The President at this point called in Mr. Forster, one of his secretaries, and instructed him to make out Mr. Lewis's commission of reappointment as a member of the Tariff Commission, effective to-day.

The President then handed me a sheet of White House paper, so that I could take down the tenor of the letter which he wished Mr. Lewis to write. I wrote down the following words: "I hereby resign as a member of the Tariff Commission, to take effect upon your acceptance."

I raised the objection at this point that an unqualified resignation of this kind would imply on the record that Mr. Lewis did not desire to continue as a member of the Tariff Commission. The President replied that this was a matter for Mr. Lewis to decide. In explanation of his request the President said that he desired to be free after the election concerning the position filled by Mr. Lewis. He said that if he were not elected the Democrats might undertake to hold up other appointments which he made during the next session of the Senate and he implied that he desired to use the reappointment of Mr. Lewis for trading purposes in case of necessity.

I thereupon asked the President whether I could have his assurance that if he were reelected Mr. Lewis would be continued as a member of the Tariff Commission. He said that he could not at this time make any commitments.

We then talked of other matters, and at the end the President asked me to have Mr. Lewis see him during the afternoon, when he said he would give him his commission.

#### b. Proposal for Reorganization

[*Report of the President's Committee on Administrative Management* (Jan., 1937), pp. 39-42.]

### D. THE INDEPENDENT REGULATORY COMMISSIONS

Beginning with the Interstate Commerce Commission in 1887, the Congress has set up more than a dozen independent regulatory commissions to exercise the control over commerce and business necessary to the orderly conduct of the Nation's economic life. These commissions have been the result of legislative groping rather than the pursuit of a consistent policy. This is shown by the wide variety in their structure and functions and also by the fact that just as frequently the Congress has given regulatory functions of the same kind to the regular executive departments.

These independent commissions have been given broad powers to explore, formulate, and administer policies of regulation; they have been given the task of investigating and prosecuting business misconduct; they have been given powers, similar to those exercised by courts of law, to pass in concrete cases upon the rights and liabilities of individuals under the statutes. They are in reality miniature independent governments set up to deal with the railroad problem, the banking problem, or the radio problem. They constitute a headless "fourth branch" of the Government, a haphazard deposit of irresponsible agencies and uncoordinated powers. They do violence to the basic theory of the American Constitution that there should be three major branches of the Government and only three. The Congress has found no effective way of supervising them, they cannot be controlled by the President, and they are answerable to the courts only in respect to the legality of their activities.

#### Mixture of Executive and Judicial Functions

The independent regulatory commissions create a confusing and difficult situation in the field of national administration. There is a conflict of principle involved in their make-up and functions. They suffer from an internal inconsistency, an unsoundness of basic theory. This is because they are vested with duties of administration and policy deter-

mination with respect to which they ought to be clearly and effectively responsible to the President, and at the same time they are given important judicial work in the doing of which they ought to be wholly independent of Executive control. In fact, the bulk of regulatory commission work involves the application of legislative "standards" of conduct to concrete cases, a function at once discretionary and judicial, and demanding, therefore, both responsibility and independence.

The evils resulting from this confusion of principles are insidious and far-reaching. In the first place, governmental powers of great importance are being exercised under conditions of virtual irresponsibility. We speak of the "independent" regulatory commissions. It would be more accurate to call them the "irresponsible" regulatory commissions, for they are areas of unaccountability. It is not enough to point out that these irresponsible commissions have of their own volition been honest and competent. Power without responsibility has no place in a government based on the theory of democratic control, for responsibility is the people's only weapon, their only insurance against abuse of power.

But though the commissions enjoy power without responsibility, they also leave the President with responsibility without power. Placed by the Constitution at the head of a unified and centralized Executive Branch, and charged with the duty to see that the laws are faithfully executed, he must detour around powerful administrative agencies which are in no way subject to his authority and which are, therefore, both actual and potential obstructions to his effective over-all management of national administration. The commissions produce confusion, conflict, and incoherence in the formulation and in the execution of the President's policies. Not only by constitutional theory, but by the steady and mounting insistence of public opinion, the President is held responsible for the wise and efficient management of the Executive Branch of the Government. The people look to him for leadership. And yet we whittle away the effective control essential to that leadership by parceling out to a dozen or more irresponsible agencies important powers of policy and administration.

At the same time the independent commission is obliged to carry on judicial functions under conditions which threaten the impartial performance of that judicial work. The discretionary work of the administrator is merged with that of the judge. Pressures and influences properly enough directed toward officers responsible for formulating and administering policy constitute an unwholesome atmosphere in which to adjudicate private rights. But the mixed duties of the commissions render escape from these subversive influences impossible.



Furthermore, the same men are obliged to serve both as prosecutors and as judges. This not only undermines judicial fairness; it weakens public confidence in that fairness. Commission decisions affecting private rights and conduct lie under the suspicion of being rationalizations of the preliminary findings which the commission, in the role of prosecutor, presented to itself.

The independent commission, in short, provides the proper working conditions neither for administration nor for adjudication. It fails to provide responsibility for the first; it does not provide complete independence for the second.

### **The Administrative Problem**

The independent commissions present a serious immediate problem. No administrative reorganization worthy of the name can leave hanging in the air more than a dozen powerful, irresponsible agencies free to determine policy and administer law. Any program to restore our constitutional ideal of a fully coordinated Executive Branch responsible to the President must bring within the reach of that responsible control all work done by these independent commissions which is not judicial in nature. That challenge cannot be ignored.

At the same time, the commissions present a long-range problem of equal or even greater seriousness. This is because we keep on creating them. Congress is always tempted to turn each new regulatory function over to a new independent commission. This is not only following the line of least resistance; it is also following a 50-year-old tradition. The multiplication of these agencies cannot fail to obstruct the effective over-all management of the Executive Branch of the Government almost in geometric ratio to their number. At the present rate we shall have 40 to 50 of them within a decade. Every bit of executive and administrative authority which they enjoy means a relative weakening of the President, in whom, according to the Constitution, "the executive Power shall be vested." As they grow in number his stature is bound to diminish. He will no longer be in reality *the Executive*, but only one of many executives, threading his way around obstacles which he has no power to overcome.

We have watched the growth of boards and commissions transform the executive branches of our State governments into grotesque agglomerations of independent and irresponsible units, bogged by the weight and confusion of the whole crazy structure. The same tendency in national administration will bring the same disastrous results. That tendency should be stopped.

It is imperative that we discover some technique or principle by which the work done by our present regulatory commissions, together with such new regulatory tasks as arise in the future, may be handled without the loss of responsibility for policy and administration and without the undermining of judicial neutrality. Is there not some way to retain the major advantages that the commissions aim to secure and, at the same time, to get rid of their basic unsoundness?

### **Redistribution of Functions**

The following proposal is put forward as a possible solution of the independent commission problem, present and future. Under this proposed plan the regulatory agency would be set up, not in a governmental vacuum outside the executive departments, but within a department. There it would be divided into an administrative section and a judicial section. The administrative section would be a regular bureau or division in the department, headed by a chief with career tenure and staffed under civil-service regulations. It would be directly responsible to the Secretary and through him to the President. The judicial section, on the other hand, would be "in" the department only for purposes of "administrative housekeeping," such as the budget, general personnel administration, and matériel. It would be wholly independent of the department and the President with respect to its work and its decisions. Its members would be appointed by the President with the approval of the Senate for long, staggered terms and would be removable only for causes stated in the statute.

The division of work between the two sections would be relatively simple. The first procedural steps in the regulatory process as now carried on by the independent commissions would go to the administrative section. It would formulate rules, initiate action, investigate complaints, hold preliminary hearings, and by a process of sifting and selection prepare the formal record of cases which is now prepared in practice by the staffs of the commissions. It would, of course, do all the purely administrative or sublegislative work now done by the commissions—in short all the work which is not essentially judicial in nature. The judicial section would sit as an impartial, independent body to make decisions affecting the public interest and private rights upon the basis of the records and findings presented to it by the administrative section. In certain types of cases where the volume of business is large and quick and routine action is necessary, the administrative section itself should in the first instance decide the cases and issue orders, and the judicial



section should sit as an appellate body to which such decisions could be appealed on questions of law.

This proposed plan meets squarely the problems presented by the independent commissions. It creates effective responsibility for the administrative and policy-determining aspects of the regulatory job and, at the same time, guarantees the complete independence and neutrality for that part of the work which must be performed after the manner of a court. It facilitates and strengthens administrative management without lessening judicial independence.

The plan has, furthermore, the great advantage of adaptability to varying conditions. With the administrative and judicial sections under the roof of the same department, the details of their organization could be worked out experimentally by Executive order. The precise division of labor between them could also be readily modified in the light of experience, and the shifting of a function from one section to the other would not raise the major jurisdictional controversies that sometimes result from proposals to alter the status or duties of an independent commission.

Furthermore, the principle of the plan does not have to be applied with exact uniformity to every commission. The requirement and present practices of each commission may be taken into consideration in carrying out this principle.

There is nothing essentially novel or startling about the proposed plan. There are numerous precedents and analogies which refute the suggestion that it is revolutionary or dangerous.

In the first place, we should remember that for 30 years important regulatory functions have been carried on by the executive departments. The powers of the Secretary of Agriculture under the Packers and Stockyards Act are essentially the same in nature and importance as those of the regulatory commissions. And there are over 20 regulatory laws similarly administered. By common consent the departments have done this work well. And yet under this arrangement the judicial phases of the regulatory process, involving important rights of property, are handled by politically responsible, policy-determining officials, a system far more open to attack than the proposed plan which carefully places the adjudication of private rights in an independent judicial section.

In the second place, the idea of giving those phases of the administrative process which involve policy and discretion to a different agency from that which issues orders or makes decisions after the manner of a court is a very old one. We find this principle working comfortably in our legislative courts, such as the Customs Court and the Court of Claims, or in that pseudo court, the Board of Tax Appeals. These

bodies decide cases originating in the process of administration and presented to them by administrative officers. It is true that they are not handling cases which are precisely the same as those coming before our regulatory commissions, but they are established as they are in order that the functions of administration need not be imposed upon the officials who are charged with the adjudication of private rights and the public interest. This same segregation of function lies at the heart of the proposed plan.

A groping after the same principle is found, in the third place, in those departments and agencies in which have been set up appellate bodies, judicialized in varying degrees, which sift and review the preliminary decisions and orders of administrative officers. This device has long been in operation in the Patent Office, the Immigration and Naturalization Service, the Veterans' Administration, the Treasury, and elsewhere. Here again we recognize the desirability of separating the task of ultimate decisions upon private rights from the preliminary steps in which there is a larger element of administrative discretion.

Finally, a close scrutiny of the way in which the more important regulatory commissions handle their work indicates that the division of functions between the proposed administrative and judicial sections is merely a formalizing by statutory enactment of the division of labor that has already been set up within the commissions themselves. In nearly every case the commissioners devote the major part of their time and energy to the deciding of cases and the issuance of orders on the basis of the records and findings prepared by the examiners, attorneys, and other officers making up the commission's staff. The division of labor is, of course, very rough and tentative, and there is no corresponding division of responsibility between the commissioners and their subordinates. But the fact that that division of labor has emerged, not under any legal compulsion, but because it has proved a normal and convenient method of getting the commission's work done, is significant for our present purposes.

The process of setting the proposed plan in motion would in a sense be merely the following of a path already roughly pricked out. The present commissioners as a body would assume the status of a judicial section. The present staff of the commission under a responsible administrative chief could, with a minimum of disruption, be molded into an administrative section. It is difficult to see how the transition could be very disturbing or why the plans should not work smoothly and efficiently.

**69. ADMINISTRATIVE REORGANIZATION**

The national administrative system has developed in a haphazard manner, Congress having from time to time provided new services and new agencies to meet specific needs, without seriously attempting to fit these new agencies into a harmonious whole. Consequently, many departments became entrusted with services not properly belonging there, some useless services were maintained, others were duplicated, and still others had a very doubtful relationship to the whole. Serious efforts to study the problem of the national administration, with a view to reorganization on a more logical and efficient basis, were first made in 1910, when Congress authorized the appointment of a Commission on Economy and Efficiency. President Taft, in 1912, submitted the report of this body to Congress but nothing came of its proposals. By joint resolution in 1920 and 1921, Congress created the Joint Committee on Reorganization, composed of three members of each house together with an outsider as representative of the President, which committee reported to Congress in 1924. At the same time President Harding and his Cabinet had been studying the matter, and presented their recommendations to Congress. None of these plans were put into effect, but, under the stimulus of the depression, Congress passed the so-called Economy Act of June 30, 1932, including a generous grant of power to the President to initiate reorganization of the executive and administrative agencies. Under this authority, President Hoover, on December 9, 1932, issued 11 executive orders which together made rather sweeping changes, but which were, on January 19, 1933, disapproved by Congress, chiefly on the ground that the newly elected President should have a free hand. Under similar authorization, reenacted on March 20, 1933, President Roosevelt, by an executive order of June 10, 1933, put into effect a much less drastic reorganization but which it was estimated would save at least \$25,000,000 annually. With this beginning, there were established in 1936 and 1937 separate committees by each house, a joint committee of both houses, and a committee appointed by the President, all of which, assisted by experts and research staffs, again studied the whole problem of administrative organization and made comprehensive reports. After extended and vigorous debate, Congress finally passed the compromise Reorganization Act of April 3, 1939, under which President Roosevelt promptly began a general reorganization, to be completed by stages.

**a. Proposal of President's Committee on Administrative Management**

[Summarized in Message of President Roosevelt to Congress, Jan. 12, 1937. *Congressional Record*, vol. 81, pt. 1, pp. 187-188.]

**TO THE CONGRESS OF THE UNITED STATES:**

I address this Message to the Congress as one who has had experience as a legislator, as a subordinate in an executive department, as the chief executive of a State and as one on whom, as President, the constitutional responsibility for the whole of the Executive branch of the Government has lain for four years.

Now that we are out of the trough of the depression, the time has come to set our house in order. The administrative management of the Government needs overhauling. We are confronted not alone by new activities, some of them temporary in character, but also by the growth of the work of the Government matching the growth of the nation over more than a generation.

Except for the enactment of the Budget and Accounting Act of 1921, no extensive change in management has occurred since 1913, when the Department of Labor was established. The Executive structure of the Government is sadly out of date. I am not the first President to report to the Congress that antiquated machinery stands in the way of effective administration and of adequate control by the Congress. Theodore Roosevelt, William H. Taft, Woodrow Wilson and Herbert Hoover made repeated but not wholly successful efforts to deal with the problem. Committees of the Congress have also rendered distinguished service to the nation through their efforts from time to time to point the way to improvement of governmental management and organization.

The opportunity and the need for action now comes to you and to me. If we have faith in our republican form of government, and in the ideals upon which it has rested for 150 years, we must devote ourselves energetically and courageously to the task of making that government efficient. The great stake in efficient democracy is the stake of the common man.

In these troubled years of world history, a self-government cannot long survive unless that government is an effective and efficient agency to serve mankind and carry out the will of the Nation. A government without good management is a house builded on sand.

In striving together to make our Government more efficient, you and I are taking up in our generation the battle to preserve that freedom of self-government which our forefathers fought to establish and hand down to us. They struggled against tyranny, against non-representative controls, against government by birth, wealth or class, against sectionalism. Our struggle now is against confusion, against ineffectiveness, against waste, against inefficiency. This battle, too, must be won, unless it is to be said that in our generation national *self*-government broke down and was frittered away in bad management.

Will it be said "Democracy was a great dream, but it could not do the job?" Or shall we here and now, without further delay, make it our business to see that our American democracy is made efficient so that it will do the job that is required of it by the events of our time?

I know your answer, and the answer of the Nation, because after all,



we are a practical people. We know good management in the home, or the farm, and in business, big and little. If any nation can find the way to effective government it should be the American people through their own democratic institutions.

Over a year ago it seemed to me that this problem of administrative management of the Executive Branch of the Government should be a major order of business of this session of the Congress. Accordingly, after extended discussions and negotiations, I appointed a Committee on Administrative Management, to examine the whole problem broadly and to suggest for my guidance and your consideration a comprehensive and balanced program for dealing with the overhead organization and management of the Executive Branch as it is established under the Constitution.

The Committee has now completed its work, and I transmit to you its report, "Administrative Management in the Government of the United States." I have examined this report carefully and thoughtfully, and am convinced that it is a great document of permanent importance. I think that the general program presented by the Committee is adequate, reasonable and practical, and that it furnishes the basis for immediate action. The broad facts are known; the need is clear; what is now required is action.

The Committee on Administrative Management points out that no enterprise can operate effectively if set up as is the Government today. There are over 100 separate departments, boards, commissions, corporations, authorities, agencies, and activities through which the work of the Government is being carried on. Neither the President nor the Congress can exercise effective supervision and direction over such a chaos of establishments, nor can overlapping, duplication, and contradictory policies be avoided.

The Committee has not spared me; they say, what has been common knowledge for twenty years, that the President cannot adequately handle his responsibilities; that he is overworked, that it is humanly impossible, under the system which we have, for him fully to carry out his constitutional duty as Chief Executive because he is overwhelmed with minor details and needless contacts arising directly from the bad organization and equipment of the Government. I can testify to this. With my predecessors who have said the same thing over and over again, I plead guilty.

The plain fact is that the present organization and equipment of the Executive Branch of the Government defeats the Constitutional intent that there be a single responsible Chief Executive to coordinate and man-

age the departments and activities in accordance with the laws enacted by the Congress. Under these conditions the Government cannot be thoroughly effective in working, under popular control, for the common good.

The Committee does not spare the Comptroller General for his failure to give the Congress a prompt and complete audit each year, totally independent of administration, as a means of holding the Executive truly to account; nor for his unconstitutional assumption of executive power; nor for the failure to keep the accounting system of the Government up to date to serve as the basis of information, management and control.

The Committee criticizes the use of boards and commissions in administration, condemns the careless use of "corporations" as governmental instrumentalities, and points out that the practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a "fourth branch" of the Government for which there is no sanction in the Constitution. Nor does the Committee spare the inadequacy of the Civil Service system.

To meet this situation and bring our administrative management up to date, the Committee presents an integrated five-point program which you will find set out in its Report. It includes these major recommendations:

1. Expand the White House staff so that the President may have a sufficient group of able assistants in his own office to keep him in closer and easier touch with the widespread affairs of administration, and to make the speedier clearance of the knowledge needed for executive decision;

2. Strengthen and develop the managerial agencies of the Government, particularly those dealing with the budget and efficiency research, with personnel and with planning, as management-arms of the Chief Executive;

3. Extend the merit system upward, outward, and downward to cover practically all non-policy-determining posts; reorganize the civil service system as a part of management under a single, responsible Administrator, and create a citizen board to serve as the watch dog of the merit system, and increase the salaries of key posts throughout the service so that the Government may attract and hold in a career service men and women of ability and character;

4. Overhaul the one hundred independent agencies, administrations, authorities, boards, and commissions, and place them by Executive order within one or the other of the following twelve major Executive departments: State, Treasury, War, Justice, Post Office, Navy, Con-



servation, Agriculture, Commerce, Labor, Social Welfare, and Public Works; and place upon the Executive continuing responsibility for the maintenance of effective organization;

5. Establish accountability of the Executive to the Congress by providing a genuine independent postaudit of all fiscal transactions by an Auditor General, and restore to the Executive complete responsibility for accounts and current transactions.

As you will see, this program rests solidly upon the Constitution and upon the American way of doing things. There is nothing in it which is revolutionary, as every element is drawn from our own experience either in government or large-scale business.

I endorse this program and feel confident that it will commend itself to you also with your knowledge of Government, and to the vast majority of the citizens of the country who want and believe in efficient self-government.

No important advance can be made toward the major objectives of the program without the passage by the Congress of the necessary legislation.

It will be necessary to provide for the establishment of two new departments, a Department of Social Welfare and a Department of Public Works, for the assignment by the President of all the miscellaneous activities to the 12 major departments thus provided, for reorganization of the civil service system, for modernizing and strengthening the managerial agencies of the Executive, and for making the Executive more strictly accountable to the Congress. By the creation of two new Departments nearly one hundred agencies now not under regular Departments can be consolidated as to their administrative functions under a total of twelve regular Departments of the Government.

The remaining elements of the five-point program, though they must await your action on the basic legislation, may be initiated through appropriations and Executive orders.

In placing this program before you I realize that it will be said that I am recommending the increase of the powers of the Presidency. This is not true. The Presidency as established in the Constitution of the United States has all of the powers that are required. In spite of timid souls in 1787 who feared effective government the Presidency was established as a single strong chief executive office in which was vested the entire executive power of the National Government, even as the legislative power was placed in the Congress and the judicial in the Supreme Court. What I am placing before you is not the request for more power, but for the tools of management and the authority to distribute the work so that the President can effectively discharge those powers

which the Constitution now places upon him. Unless we are prepared to abandon this important part of the Constitution, we must equip the Presidency with authority commensurate with his responsibilities under the Constitution.

The Committee on Administrative Management, after a careful examination of recent attempts to reorganize the Government and of State reorganizations carried out so ably by Governor Frank O. Lowden in Illinois, Governor Alfred E. Smith in New York, Governor Harry F. Byrd in Virginia, Governor William Tudor Gardiner in Maine, and by other governors, accepts the view held by my distinguished predecessors that the detailed work of reorganization is, as President Theodore Roosevelt said over 30 years ago, "essentially executive in its nature." The Committee accordingly recommends that reorganization should be a continuing duty and authority of the Chief Executive on the basis of standards set by the Congress. To make this safe, the Committee insists, however, that the Congress keep a watchful eye upon reorganization both through the annual budget and through the maintenance of strict executive accountability to the Congress under the independent audit of all financial transactions by an Auditor General. Under the proposed plan the Congress must by law establish the major departments and determine in advance the general principles which shall guide the President in distributing the work of the Government among these departments, and in this task the President is to act on the basis of careful research by the Bureau of the Budget and after conference with those primarily affected. Reorganization is not a mechanical task, but a human task, because government is not a machine, but a living organism. With these clear safe-guards, and in view of our past muddling with reorganization, one cannot but accept the logic and wisdom of the recommendations.

I would not have you adopt this five-point program, however, without realizing that this represents an important step in American history. If we do this, we reduce from over 100 down to a dozen the operating executive agencies of the Government, and we bring many little bureaucracies under broad coordinated democratic authority.

But in so doing, we shall know that we are going back to the Constitution, and giving to the Executive Branch modern tools of management and an up-to-date organization which will enable the Government to go forward efficiently. We can prove to the world that American government is both democratic and effective.

In this program I invite your cooperation, and pledge myself to deal energetically and promptly with the executive responsibilities of reor-

ganization and administrative management, when you shall have made this possible by the necessary legislation.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,  
January 12, 1937.

## b. Reorganization Act of 1939

[Act of Apr. 3, 1939. *Public No. 19, 76 Cong., 1 Sess. (H.R. 4425).*]

### AN ACT

To provide for reorganizing agencies of the Government, and for other purpose

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That this Act may be cited as the "Reorganization Act of 1939."

## TITLE I—REORGANIZATION

### PART 1

SECTION 1. (a) The Congress hereby declares that by reason of continued national deficits beginning in 1931 it is desirable to reduce substantially Government expenditures and that such reduction may be accomplished in some measure by proceeding immediately under the provisions of this Act. The President shall investigate the organization of all agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(1) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(2) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(3) To group, coordinate, and consolidate agencies of the Government, as nearly as may be, according to major purposes;

(4) To reduce the number of agencies by consolidating those having similar functions under a single head, and to abolish such agencies as may not be necessary for the efficient conduct of the Government; and

(5) To eliminate overlapping and duplication of effort.

(b) The Congress declares that the public interest demands the carrying out of the purposes specified in subsection (a) and that such purposes may be accomplished in great measure by proceeding immediately under the provisions of this title, and can be accomplished more speedily thereby than by the enactment of specific legislation.

SEC. 2. When used in this title, the term "agency" means any executive department, commission, independent establishment, corporation owned or controlled by the United States, board, bureau, division, service, office, authority, or administration, in the executive branch of the Government.

SEC. 3. No reorganization plan under section 4 shall provide—

(a) For the abolition or transfer of an executive department or all the functions thereof or for the establishment of any new executive departments;

(b) In the case of the following agencies, for the transfer, consolidation, or abolition of the whole or any part of such agency or of its head, or of all or any of the functions of such agency or of its head: Civil Service Commission, Coast Guard, Engineer Corps of the United States Army, Mississippi River Commission, Federal Communications Commission, Federal Power Commission, Federal Trade Commission, General Accounting Office, Interstate Commerce Commission, National Labor Relations Board, Securities and Exchange Commission, Board of Tax Appeals, United States Employees' Compensation Commission, United States Maritime Commission, United States Tariff Commission, Veterans' Administration, National Mediation Board, National Railroad Adjustment Board, Railroad Retirement Board, the Federal Deposit Insurance Corporation, or the Board of Governors of the Federal Reserve System; or

(c) For changing the name of any executive department or the title of its head, or for designating any agency as "Department" or its head as "Secretary"; or

(d) For the continuation of any agency beyond the period authorized by law for the existence of such agency; or

(e) For the continuation of any function of any agency beyond the period authorized by law for the exercise of such function; or

(f) For authorizing any agency to exercise any function which is not expressly authorized by law.

SEC. 4. Whenever the President, after investigation, finds that—

(a) the transfer of the whole or any part of any agency or the functions thereof to the jurisdiction and control of any other agency; or

(b) the consolidation of the functions vested in any agency; or

(c) the abolition of the whole or any part of any agency which agency or part (by reason of transfers under this Act or otherwise, or by reason of termination of its functions in any manner) does not



have, or upon the taking effect of the reorganizations specified in the reorganization plan will not have, any functions,

is necessary to accomplish one or more of the purposes of section 1 (a) he shall—

(d) prepare a reorganization plan for the making of the transfer, consolidations, and abolitions, as to which he has made findings as to which he includes in the plan. Such plan shall also—

(1) designate, in such cases as he deems necessary, the name of any agency affected by a reorganization and the title of its head;

(2) make provision for the transfer or other disposition of the records, property (including office equipment), and personnel affected by such transfer, consolidation, or abolition;

(3) make provision for the transfer of such unexpended balance of appropriations available for use in connection with the function or agency transferred or consolidated, as he deems necessary by reason of the transfer or consolidation for use in connection with the transferred or consolidated functions, or for the use of the agency to which the transfer is made, but such unexpended balances so transferred shall be used only for the purposes for which such appropriation is originally made;

(4) make provision for winding up the affairs of the agency abolished; and

(e) transmit such plan (bearing an identifying number) to the Congress, together with a declaration that, with respect to each transfer, consolidation, or abolition referred to in paragraph (a), (b), or (c) of this section and specified in the plan, he has found that such transfer, consolidation, or abolition is necessary to accomplish one or more of the purposes of section 1 (a). The delivery to both Houses shall be on the same day and shall be made to each House while it is in session.

The President, in his message transmitting a reorganization plan, shall state the reduction of expenditures which it is probable will be brought about by the taking effect of the reorganizations specified in the plan.

SEC. 5. The reorganization specified in the plan shall take effect in accordance with the plan:

(a) Upon the expiration of sixty calendar days after the date on which the plan is transmitted to the Congress, but only if during such sixty-day period there has not been passed by the two Houses a concurrent resolution stating in substance that the Congress does not favor the reorganization plan.

(b) If the Congress adjourns sine die before the expiration of the sixty-day period, a new sixty-day period shall begin on the opening day of the next succeeding regular or special session. A similar rule shall be applicable in the case of subsequent adjournments sine die before the expiration of sixty days.

SEC. 6. No reorganization under this title shall have the effect—

(a) of continuing any agency or function beyond the time when it would have terminated if the reorganization had not been made; or

(b) of continuing any function beyond the time when the agency in which it was vested before the reorganization would have terminated if the reorganization had not been made; or

(c) of authorizing any agency to exercise any function which is not expressly authorized by law.

SEC. 7. For the purposes of this title any transfer, consolidation, abolition, designation, disposition, or winding up of affairs, referred to in section 4 (d), shall be deemed a "reorganization."

SEC. 8. (a) All orders, rules, regulations, permits, or other privileges made, issued, or granted by or in respect of any agency or function transferred to, or consolidated with, any other agency or function under the provisions of this title, and in effect at the time of the transfer or consolidation, shall continue in effect to the same extent as if such transfer or consolidation had not occurred, until modified, superseded, or repealed.

(b) No suit, action, or other proceeding lawfully commenced by or against the head of any agency or other officer of the United States, in his official capacity or in relation to the discharge of his official duties, shall abate by reason of any transfer of authority, power, and duties from one officer or agency of the Government to another under the provisions of this title, but the court, on motion or supplemental petition filed at any time within twelve months after such transfer takes effect, showing a necessity for a survival of such suit, action, or other proceeding to obtain a settlement of the questions involved, may allow the same to be maintained by or against the head of the agency or other officer of the United States to whom the authority, powers, and duties are transferred.

(c) All laws relating to any agency or function transferred to, or consolidated with, any other agency or function under the provisions of this title, shall, insofar as such laws are not inapplicable, remain in full force and effect.



SEC. 9. The appropriations or portions of appropriations unexpended by reason of the operation of this title shall not be used for any purpose but shall be impounded and returned to the Treasury.

SEC. 10. (a) Whenever the employment of any person is terminated by a reduction of personnel as a result of a reorganization effected under this title, such person shall thereafter be given preference, when qualified, whenever an appointment is made in the executive branch of the Government, but such preference shall not be effective for a period longer than twelve months from the date the employment of such person is terminated.

(b) Any transfer of personnel under this title shall be without change in classification or compensation, except that this requirement shall not operate after the end of the fiscal year during which the transfer is made to prevent the adjustment of classification or compensation to conform to the duties to which such transferred personnel may be assigned.

SEC. 11. If the reorganizations specified in a reorganization plan take effect, the reorganization plan shall be printed in the Statutes at Large in the same volume as the public laws, and shall be printed in the Federal Register.

SEC. 12. No reorganization specified in a reorganization plan shall take effect unless the plan is transmitted to the Congress before January 21, 1941.

## PART 2

SEC. 21. The following sections of this part are enacted by the Congress:

(a) As an exercise of the rule-making power of the Senate and the House of Representatives, respectively, and as such they shall be considered as part of the rules of each House, respectively, but applicable only with respect to the procedure to be followed in such House in the case of resolutions (as defined in section 22); and such rules shall supersede other rules only to the extent that they are inconsistent therewith; and

(b) With full recognition of the constitutional right of either House to change such rules (so far as relating to the procedure in such House) at any time, in the same manner and to the same extent as in the case of any other rule of such House.

SEC. 22. As used in this part, the term "resolution" means only a concurrent resolution of the two Houses of Congress, the matter after the resolving clause of which is as follows: "That the Congress does not favor the reorganization plan numbered \_\_\_\_\_ transmitted to Congress by the President on \_\_\_\_\_, 19\_\_\_\_.", the blank

spaces therein being appropriately filled; and does not include a concurrent resolution which specifies more than one reorganization plan.

SEC. 23. A resolution with respect to a reorganization plan shall be referred to a committee (and all resolutions with respect to the same plan shall be referred to the same committee) by the President of the Senate or the Speaker of the House of Representatives, as the case may be.

SEC. 24. (a) If the committee to which has been referred a resolution with respect to a reorganization plan has not reported it before the expiration of ten calendar days after its introduction (or, in the case of a resolution received from the other House, ten calendar days after its receipt), it shall then (but not before) be in order to move either to discharge the committee from further consideration of such resolution, or to discharge the committee from further consideration of any other resolution with respect to such reorganization plan which has been referred to the committee.

(b) Such motion may be made only by a person favoring the resolution, shall be highly privileged (except that it may not be made after the committee has reported a resolution with respect to the same reorganization plan), and debate thereon shall be limited to not to exceed one hour, to be equally divided between those favoring and those opposing the resolution. No amendment to such motion shall be in order, and it shall not be in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(c) If the motion to discharge is agreed to or disagreed to, such motion may not be renewed, nor may another motion to discharge the committees be made with respect to any other resolution with respect to the same reorganization plan.

SEC. 25. (a) When the committee has reported, or has been discharged from further consideration of, a resolution with respect to a reorganization plan, it shall at any time thereafter be in order (even though a previous motion to the same effect has been disagreed to) to move to proceed to the consideration of such resolution. Such motion shall be highly privileged and shall not be debatable. No amendment to such motion shall be in order and it shall not be in order to move to reconsider the vote by which such motion is agreed to or disagreed to.

(b) Debate on the resolution shall be limited to not to exceed ten hours, which shall be equally divided between those favoring and those opposing the resolution. A motion further to limit debate shall not be debatable. No amendment to, or motion to recommit, the resolution shall be in order, and it shall not be in order to move to reconsider the vote by which the resolution is agreed to or disagreed to.

SEC. 26. (a) All motions to postpone, made with respect to the discharge from committee, or the consideration of, a resolution with respect to a reorganization plan, and all motions to proceed to the consideration of other business, shall be decided without debate.

(b) All appeals from the decisions of the Chair relating to the application of the rules of the Senate or the House of Representatives, as the case may be, to the procedure relating to a resolution with respect to reorganization plan shall be decided without debate.

SEC. 27. If, prior to the passage by one House of a resolution of that House with respect to a reorganization plan, such House receive from the other House a resolution with respect to the same plan, then—

(a) If no resolution of the first House with respect to such plan has been referred to committee, no other resolution with respect to the same plan may be reported or (despite the provisions of section 24 (a)) be made the subject of a motion to discharge.

(b) If a resolution of the first House with respect to such plan has been referred to committee—

(1) the procedure with respect to that or other resolutions of such House with respect to such plan which have been referred to committee shall be the same as if no resolution from the other House with respect to such plan had been received; but

(2) on any vote on final passage of a resolution of the first House with respect to such plan the resolution from the other House with respect to such plan shall be automatically substituted for the resolution of the first House.

## TITLE II—BUDGETARY CONTROL

SEC. 201. Section 2 of the Budget and Accounting Act, 1921 (U. S. C., 1934 edition, title 31, sec. 2), is amended by inserting after the word "including" the words "any independent regulatory commission or board and."

## TITLE III—ADMINISTRATIVE ASSISTANTS

SEC. 301. The President is authorized to appoint not to exceed six administrative assistants and to fix the compensation of each at the rate of not more than \$10,000 per annum. Each such administrative assistant shall perform such duties as the President may prescribe.

Approved, April 3, 1939.

## c. Plans of Reorganization

[Plan No. I submitted to Congress, Apr. 25, 1939; Plan No. II submitted May 9, 1939; both plans approved by Congress and made effective on July 1, 1939.<sup>1</sup> *Congressional Record*, vol. 84, pt. 5, pp. 4708-4714, 5281-5286.]

## TO THE CONGRESS OF THE UNITED STATES:

Pursuant to the provisions of the Reorganization Act of 1939 (Public No. 19, 76th Congress, 1st Session), approved April 3, 1939, I herewith transmit Reorganization Plan No. I, which after investigation, I have prepared in accordance with the provisions of section 4 of the Act; and I declare that with respect to each transfer, consolidation, or abolition made in Reorganization Plan No. I, I have found that such transfer, consolidation, or abolition is necessary to accomplish one or more of the purposes of section 1 (a) of the Act.

In these days of ruthless attempts to destroy democratic government, it is baldly asserted that democracies must always be weak in order to be democratic at all; and that, therefore, it will be easy to crush all free states out of existence.

Confident in our Republic's 150 years of successful resistance to all subversive attempts upon it, whether from without or within, nevertheless we must be constantly alert to the importance of keeping the tools of American democracy up to date. It is our responsibility to make sure that the peoples' government is in condition to carry out the peoples' will, promptly, effectively, without waste or lost motion.

In 1883 under President Arthur we strengthened the machinery of democracy by the Civil Service law; beginning in 1905 President Roosevelt initiated important inquiries into Federal administration; in 1911 President Taft named the Economy and Efficiency Commission which made very important recommendations; in 1921 under Presidents Wilson and Harding we tightened up our budgetary procedure. Presidents Theodore Roosevelt, Taft, Wilson, Harding, Coolidge and Hoover in succession strongly recommended the rearrangement of Federal administrative activities. In 1937 I proposed, on the basis of an inquiry authorized and appropriated for by the Congress, the strengthening of the administrative management of the executive establishment.

<sup>1</sup> Plan No. III was submitted to Congress on April 4, 1940, and at the time of this writing (June 15, 1940) had been neither approved nor disapproved; Plan No. IV submitted Apr. 11, 1940, and resolution of disapproval passed in House May 8, 1940 (232-153), but rejected in Senate May 14, 1940 (34-46); Plan No. V submitted May 22, 1940, and approved by Congress June 3, 1940. Texts in *Congressional Record*, 76 Cong., 3 Sess., pp. 5839-5841, 6530-6533, 10044 (current Record).



None of all this long series of suggestions, running over more than a quarter of a century, was in any sense personal or partisan in design.

These measures have all had only one supreme purpose—to make democracy work—to strengthen the arms of democracy in peace or war and to ensure the solid blessings of free government to our people in increasing measure.

We are not free if our administration is weak. But we are free if we know, and others know, that we are strong; that we can be tough as well as tender hearted; and that what the American people decide to do can and will be done, capably and effectively, with the best national equipment that modern organizing ability can supply in a country where management and organization is so well understood in private affairs.

My whole purpose in submitting this Plan is to improve the administrative management of the Republic, and I feel confident that our nation is united in this central purpose, regardless of differences upon details.

This Plan is concerned with the practical necessity of reducing the number of agencies which report directly to the President and also of giving the President assistance in dealing with the entire Executive Branch by modern means of administrative management.

Forty years ago in 1899 President McKinley could deal with the whole machinery of the Executive Branch through his eight cabinet secretaries and the heads of two commissions; and there was but one commission of the so-called quasi-judicial type in existence. He could keep in touch with all the work through eight or ten persons.

Now, forty years later, not only do some thirty major agencies (to say nothing of the minor ones) report directly to the President, but there are several quasi-judicial bodies which have enough administrative work to require them also to see him on important executive matters.

It has become physically impossible for one man to see so many persons, to receive reports directly from them, and to attempt to advise them on their own problems which they submit. In addition the President today has the task of trying to keep their programs in step with each other or in line with the national policy laid down by the Congress. And he must seek to prevent unnecessary duplication of effort.

The administrative assistants provided for the President in the Reorganization Act cannot perform these functions of overall management and direction. Their task will be to help me get information and condense and summarize it,—they are not to become in any sense Assistant Presidents nor are they to have any authority over anybody in any department or agency.

The only way in which the President can be relieved of the physically impossible task of directly dealing with 30 or 40 major agencies is by Reorganization—by the regrouping of agencies according to their major purposes under responsible heads who will report to the President, just as is contemplated by the Reorganization Act of 1939.

This Act says that the President shall investigate the organization of all agencies of the Government and determine what changes are necessary to accomplish any one or more of five definite purposes:

- (1) To reduce expenditures
- (2) To increase efficiency
- (3) To consolidate agencies according to major purposes
- (4) To reduce the number of agencies by consolidating those having similar functions and by abolishing such as may not be necessary
- (5) To eliminate overlapping and duplication of effort.

It being obviously impracticable to complete this task at one time, but, having due regard to the declaration of Congress that it should be accomplished immediately and speedily, I have decided to undertake it promptly in several steps.

The first step is to improve overall management, that is to do those things which will accomplish the purposes set out in the law, and which, at the same time, will reduce the difficulties of the President in dealing with the multifarious agencies of the Executive Branch and assist him in distributing his responsibilities as the chief administrator of the government by providing him with the necessary organization and machinery for better administrative management.

The second step is to improve the allocation of departmental activities, that is, to do those things which will accomplish the purposes set out in the law and at the same time help that part of the work of the executive branch which is carried on through executive departments and agencies. In all this the responsibility to the people is through the President.

The third step is to improve intradepartmental management, that is, to do those things which will enable the heads of departments and agencies the better to carry out their own duties and distribute their own work among their several assistants and subordinates.

Each of these three steps may require from time to time the submission of one or more plans involving one or more reorganizations, but it is my purpose to fulfill the duty imposed upon me by the Congress as expeditiously as practicable and to the fullest extent possible in view of the exceptions and exemptions set out in the Act.



The plan I now transmit is divided into four parts or sections which I shall describe briefly as follows:

#### PART 1—EXECUTIVE OFFICE OF THE PRESIDENT

In my message to the Congress of January 12, 1937, in discussing the problem of how to improve the administrative management of the executive branch, I transmitted with my approval certain recommendations for strengthening and developing the management arms of the President. Those three management arms deal with (1) budget, and efficiency research, (2) planning, and (3) personnel. My accumulated experience during the two years since that time has deepened my conviction that it is necessary for the President to have direct access to these managerial agencies in order that he may have the machinery to enable him to carry out his constitutional responsibility, and in order that he may be able to control expenditures, to increase efficiency, to eliminate overlapping and duplication of effort, and to be able to get the information which will permit him the better to advise the Congress concerning the state of the Union and the program of the government.

Therefore, I find it necessary and desirable in carrying out the purposes of the Act to transfer the Bureau of the Budget to the Executive Office of the President from the Treasury Department. It is apparent from the legislative history of the Budget and Accounting Act that it was the purpose in 1921 to set up an executive budget for which the President would be primarily responsible to the Congress and to the people, and that the Director of the Budget was to act under the immediate direction and supervision of the President. While no serious difficulties have been encountered because of the fact that the Bureau of the Budget was placed in the Treasury Department so far as making budgetary estimates has been concerned, it is apparent that its coordinating activities and its research and investigational activities recently provided for by the Congress, will be facilitated if the Bureau is not a part of one of the ten executive departments. Also, in order that the Bureau of the Budget may the better carry out its work of coordination and investigation, I find it desirable and necessary in order to accomplish the purposes of the Act to transfer to the Bureau of the Budget the functions of the Central Statistical Board.

By these transfers to the Executive Office, the President will be given immediate access to that managerial agency which is concerned with the preparation and administration of the budget, with the coordination of the work of the governmental agencies, and with research and investiga-

tion necessary to accomplish the five definite purposes of the Reorganization Act of 1939.

I also find it necessary and desirable to transfer to the Executive Office of the President the National Resources Committee, now an independent establishment, and to consolidate with it by transfer from the Department of Commerce the functions of the Federal Employment Stabilization Office, the consolidated unit to be known as the National Resources Planning Board. This Board would be made up as is the present Advisory Board of the National Resources Committee of citizens giving part time services to the government, who aided by their technical staff would be able to advise the President, the Congress and the people with respect to plans and programs for the conservation of the national resources, physical and human. By these transfers to the Executive Office, the President will be given more direct access to and immediate direction over that agency which is concerned with planning for the utilization and conservation of the national resources, an indispensable part of the equipment of the Chief Executive.

On previous occasions I have recommended and I hereby renew and emphasize my recommendation that the work of this Board be placed upon a permanent statutory basis.

Because of an exemption in the Act, it is impossible to transfer to the Executive Office the administration of the third managerial function of the government, that of personnel. However, I desire to inform the Congress that it is my purpose to name one of the administrative assistants to the President, authorized in the Reorganization Act of 1939, to serve as a liaison agent of the White House on personnel management.

In this manner, the President will be given for the first time direct access to the three principal necessary management agencies of the government. None of the three belongs in any existing Department. With their assistance, and with this reorganization, it will be possible for the President to continue the task of making investigations of the organization of the government in order to control expenditures, increase efficiency, and eliminate overlapping.

## PART 2—FEDERAL SECURITY AGENCY

Studies heretofore made by me and researches made at my direction, as well as recommendations submitted by me to the Congress, and especially those contained in my message of January 12, 1937, indicate clearly that to carry out the purposes of the Reorganization Act of 1939 to group, coordinate and consolidate agencies of the government according

to major purposes and to reduce the number of agencies by consolidating those having similar functions under a single head, would require the provision of three general agencies in addition to the ten Executive Departments.

It is my objective then, by transfer, consolidation and abolition to set up a Federal Security Agency, a Federal Works Agency and a Federal Loan Agency, and then to distribute among the ten Executive Departments and these three new agencies, the major independent establishments in the government (excepting those exempt from the operations of the Act) in order to minimize overlapping and duplication, to increase efficiency and to reduce expenditures to the fullest extent consistent with the efficient operation of the government.

I find it necessary and desirable to group in a Federal Security Agency those agencies of the government, the major purposes of which are to promote social and economic security, educational opportunity and the health of the citizens of the nation.

The agencies to be grouped are the Social Security Board, now an independent establishment, the United States Employment Service, now in the Department of Labor, the Office of Education now in the Department of the Interior, the Public Health Service now in the Treasury Department, the National Youth Administration, now in the Works Progress Administration, and the Civilian Conservation Corps, now an independent agency.

The Social Security Board is placed under the Federal Security Agency, and at the same time the United States Employment Service is transferred from the Department of Labor and consolidated with the unemployment compensation functions of the Social Security Board in order that their similar and related functions of social and economic security may be placed under a single head and their internal operations simplified and integrated.

The unemployment compensation functions of the Social Security Board and the employment service of the Department of Labor are concerned with the same problem, that of the employment, or the unemployment, of the individual worker.

Therefore, they deal necessarily with the same individual. These particular services to the particular individual also are bound up with the public assistance activities of the Social Security Board. Not only will these similar functions be more efficiently and economically administered at the federal level by such grouping and consolidation, but this transfer and merger also will be to the advantage of the administration of state social security programs and result in considerable saving of

money in the administrative costs of the governments of the forty-eight states as well as those of the United States. In addition to this saving of money there will be a considerable saving of time and energy not only on the part of administrative officials concerned with this program in both federal and state governments, but also on the part of employers and workers, permitting through the simplification of procedures a reduction in the number of reports required and the elimination of unnecessary duplication in contacts with workers and with employers.

Because of the relationship of the educational opportunities of the country to the security of its individual citizens, the Office of Education with all of its functions, including, of course, its administration of federal-state programs of vocational education, is transferred from the Department of the Interior to the Federal Security Agency. This transfer does not increase or extend the activities of the federal government in respect to education, but does move the existing activities into a grouping where the work may be carried on more efficiently and expeditiously, and where coordination and the elimination of overlapping may be better accomplished. The Office of Education has no relationship to the other functions of the Department of the Interior.

The Public Health Service is transferred from the Treasury Department to the Federal Security Agency. It is obvious that the health activities of the federal government may be better carried out when so grouped than if they are left in the Treasury, which is primarily a fiscal agency, and where the necessary relationships with other social security, employment and educational activities now must be carried on by an elaborate scheme of interdepartmental committee work.

The National Youth Administration is transferred from the Works Progress Administration to the Federal Security Agency since its major purpose is to extend the educational opportunities of the youth of the country and to bring them through the processes of training into the possession of skills which enable them to find employment. Other divisions of the Federal Security Agency will have the task of finding jobs, providing for unemployment compensation and other phases of social security, while still other units of the new agency will be concerned with the problem of primary and secondary education, as well as vocational education and job training and retraining for employment. While much of the work of the National Youth Administration has been carried on through work projects, these have been merely the process through which its major purpose was accomplished, and, therefore, this agency under the terms of the Act should be grouped with the other security agencies rather than with the work agencies.



For similar reasons the Civilian Conservation Corps, now an independent establishment, is placed under the Federal Security Agency because of the fact that its major purpose is to promote the welfare and further the training of the individuals who make up the corps, important as may be the construction work which they have carried on so successfully. The Civilian Conservation Corps is a small coordinating agency which supervises work carried on with the cooperation of several regular departments and independent units of the government. This transfer would not interfere with the plan of work heretofore carried on but it would enable the Civilian Conservation Corps to coordinate its policies, as well as its operations, with those other agencies of the government concerned with the educational and health activities and with human security.

### PART 3—FEDERAL WORKS AGENCY

In order to carry out the purpose of the Reorganization Act of 1939 I find it necessary and desirable to group and consolidate under a Federal Works Agency those agencies of the federal government dealing with public works not incidental to the normal work of other departments, and which administer federal grants or loans to state and local governments or other agencies for the purposes of construction.

The agencies so to be grouped are: the Bureau of Public Roads, now in the Department of Agriculture; the Public Buildings Branch of the Procurement Division, now in the Treasury Department and the branch of Building Management of the National Park Service (so far as it is concerned with public buildings which it operates for other departments or agencies) now in the Department of the Interior; the United States Housing Authority, now in the Department of the Interior; the Federal Emergency Administration of Public Works (familiarly known as PWA); and the Works Progress Administration (familiarly known as WPA) except the functions of the National Youth Administration.

The transfer of both the Public Works Administration and the Works Progress Administration to the new Federal Works Agency would provide for both principal types of public works that have been carried on by the federal government directly or in cooperation with the state and local governments. I find that it will be possible to reduce administrative costs as well as to improve efficiency and to eliminate overlapping by bringing these different programs of public works under a common head. But, because of the differences that justified their separate operation in the past and differences that will continue in the future to distinguish certain phases of major public works from work relief, I find it neces-

sary to maintain them at least for the present as separate subordinate units of the Federal Works Agency.

The present Federal Emergency Administration of Public Works is placed under the Federal Works Agency under the shorter name of Public Works Administration.

The name of the Works Progress Administration has been changed to Works Projects Administration in order to make its title more descriptive of its major purpose.

The Bureau of Public Roads is transferred from the Department of Agriculture to the Federal Works Agency and as a separate unit under the name of Public Roads Administration. This will bring the administration of the federal roads program with its grants-in-aid to the states into coordination with other major public works programs and other programs of grants and loans to the states.

The construction and operation of many public buildings is now carried on in two agencies which are consolidated under the new Federal Works Agency, namely the Public Buildings Branch of the Procurement Division of the Treasury Department (which is concerned with the construction of federal buildings and with the operation of many public buildings outside the District of Columbia) and the Branch of Building Management of the National Park Service, of the Department of the Interior, which is concerned with the operation of public buildings in the District of Columbia. These two separate activities are consolidated in one unit to be known as the Public Buildings Administration. Improved efficiency, coordination of effort, and savings will result from this transfer and consolidation.

Then, also, there is transferred from the Department of the Interior to the Federal Works Agency the United States Housing Authority. The major purpose of the United States Housing Authority is to administer grants-in-aid and loans to local public housing authorities in accordance with its established standards of construction in that part of the housing field which cannot be reached economically by private enterprise. For these reasons, it should be grouped with those other agencies which have to do with public works, with grants and loans to state and local governments and with construction practices and standards.

#### PART 4—FEDERAL LOAN AGENCY AND TRANSFERS OF INDEPENDENT LENDING AGENCIES

In order to carry out the purposes of the Reorganization Act of 1939 I find it necessary and desirable to group under a Federal Loan Agency those independent lending agencies of the government which have been



established from time to time for the purpose of stimulating and stabilizing the financial, commercial and industrial enterprises of the nation.

The agencies to be so grouped in the Federal Loan Agency are: the Reconstruction Finance Corporation, the Electric Home and Farm Authority, the Federal Home Loan Bank Board, the Federal Housing Administration and their associated agencies and boards, as well as the Export-Import Bank of Washington.

Since 1916 the Congress has established from time to time agencies for providing loans, directly or indirectly, for the stimulation and stabilization of agriculture, and such agencies should in my opinion be grouped with the other agricultural activities of the government. For that reason I find it necessary and desirable to accomplish the purposes of the Act to transfer the Farm Credit Administration, the Federal Farm Mortgage Corporation and the Commodity Credit Corporation and associated agencies, to the Department of Agriculture.

#### ECONOMY AND EFFICIENCY

One of the five purposes of the Reorganization Act of 1939 is "to reduce expenditures to the fullest extent consistent with the efficient operation of the Government." This purpose is important in each phase of the Plan here presented. The Reorganization Act prohibits abolishing functions—in other words basic services or activities performed. Therefore the reduction in expenditures to be effected must necessarily be brought about chiefly in the overhead administrative expenses of the agencies set up to perform certain functions. The chance for economy arises therefore not from stopping work, but from organizing the work and the overhead more efficiently in combination with other similar activities. Only the Congress can abolish or curtail functions now provided by law.

The overhead administrative costs of all the agencies affected in Reorganization Plan No. I is about \$235,000,000. This does not include the loans they make, the benefits they pay, the wages of the unemployed who have been given jobs, it does not include the loans and grants to states or, in short, the functional expense. It does include the overhead expense of operating and administering all these agencies.

The reduction of administrative expenditures which it is probable will be brought about by the taking effect of the reorganizations specified in the Plan is estimated as nearly as may be at between \$15,000,000 and \$20,000,000 annually, a substantial lowering of the existing overhead. Certain of these economies can be brought about almost immediately,

others will require a painstaking and gradual readjustment in the machinery and business practices of the Government.

Any such estimate is incomplete, however, without reference to the corresponding savings which will follow in the states and cities through the recommended consolidation of the Federal services with which they cooperate, and the improved efficiency and convenience which will be felt by citizens all over the nation many of whom will be able to find in a single office many of the services now scattered in several places. These economies will undoubtedly exceed the direct savings in the Federal Budget.

It will not be necessary to ask the Congress for any additional appropriations for the administrative expenses of the three consolidated Agencies set up in this Plan, since their costs will be met from funds now available for the administrative expenses of their component units. Actually new expenses will be only a fractional part of the expected savings.

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Neither on this Reorganization Plan No. I nor on future Reorganization Plans, covering interdepartmental changes and intradepartmental changes, will every person agree on each and every detail. It is true that out of the many groupings and re-groupings proposed in this Message a few of the individual agencies could conceivably be placed elsewhere.

Nevertheless, I have been seeking to consider the functional origin and purpose of each agency as required by the Reorganization Bill itself.

If in the future experience shows that one or two of them should be re-grouped, it will be wholly possible for the President and the Congress to make the change.

The Plan presented herewith represents two years of study. It is a simple and easily understood Plan. It conforms to methods of executive administration used by large private enterprises which are engaged in many lines of production. Finally, it will save a sum of money large in comparison with the existing overhead of the agencies involved.

I trust, therefore, that the Congress will view the Plan as a whole and make it possible to take the first step in improving the executive administration of the Government of the United States.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,  
April 25, 1939.

[Then follows the text of the executive order making the detailed changes.]

## 70. ESTABLISHMENT OF THE MERIT SYSTEM

The method of filling the numerous positions under the national government, particularly those of a minor and clerical nature, has always been a difficult question. Even Washington, with his honesty of purpose and high ideals, refused to appoint to office those who were definitely antagonistic to his policies, and to that extent made appointments on a political basis. Few removals were made in these minor positions, however, during the early administrations, and not until the time of Jackson did the spoils system become well established. Efforts to reform the civil service were made continuously for some time before the Civil War, and Congress in 1871 yielded to the pressure for reform by passing a mild and generally ineffective law. Finally, as the result of continued demands, and particularly as the result of the assassination of President Garfield by a disappointed office-seeker, Congress in 1883 passed the so-called Pendleton Act, which, together with the Classification Act of 1923 and the Retirement Act of 1926, constitutes the great charter of the national civil service.

### a. Civil Service Act of 1883

[U. S. Statutes, vol. 22, pp. 403-407.]

An act to regulate and improve the civil service of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the President is authorized to appoint, by and with the advice and consent of the Senate, three persons, not more than two of whom shall be adherents of the same party, as Civil Service Commissioners, and said three commissioners shall constitute the United States Civil Service Commission. Said commissioners shall hold no other official place under the United States.

The President may remove any commissioner; and any vacancy in the position of commissioner shall be so filled by the President, by and with the advice and consent of the Senate, as to conform to said conditions for the first selection of commissioners. . . .

SECTION 2. That it shall be the duty of said commissioners:

First. To aid the President, as he may request, in preparing suitable rules for carrying this act into effect, and when said rules shall have been promulgated it shall be the duty of all officers of the United States in the departments and offices to which any such rules may relate to aid, in all proper ways, in carrying said rules, and any modifications thereof, into effect.

Second. And, among other things, said rules shall provide and declare, as nearly as the conditions of good administration will warrant, as follows:

First, for open, competitive examinations for testing the fitness of applicants for the public service now classified or to be classified hereunder. Such examinations shall be practical in their character, and so far as may

be shall relate to those matters which will fairly test the relative capacity and fitness of the persons examined to discharge the duties of the service into which they seek to be appointed.

Second, that all the offices, places, and employments so arranged or to be arranged in classes shall be filled by selections according to grade from among those graded highest as the results of such competitive examinations.

Third, appointments to the public service aforesaid in the departments at Washington shall be apportioned among the several States and Territories and the District of Columbia upon the basis of population as ascertained at the last preceding census. Every application for an examination shall contain, among other things, a statement, under oath, setting forth his or her actual bona fide residence at the time of making the application, as well as how long he or she has been a resident of such place.

Fourth, that there shall be a period of probation before any absolute appointment or employment aforesaid.

Fifth, that no person in the public service is for that reason under any obligations to contribute to any political fund, or to render any political service, and that he will not be removed or otherwise prejudiced for refusing to do so.

Sixth, that no person in said service has any right to use his official authority or influence to coerce the political action of any person or body.

Seventh, there shall be non-competitive examinations in all proper cases before the commission, when competent persons do not compete, after notice has been given of the existence of the vacancy, under such rules as may be prescribed by the commissioners as to the manner of giving notice.

Eighth, that notice shall be given in writing by the appointing power to said commission of the persons selected for appointment or employment from among those who have been examined, of the place of residence of such persons, of the rejection of any such persons after probation, of transfers, resignations, and removals, and of the date thereof, and a record of the same shall be kept by said commission. And any necessary exceptions from said eight fundamental provisions of the rules shall be set forth in connection with such rules, and the reasons therefor shall be stated in the annual reports of the commission.

Third. Said commission shall, subject to the rules that may be made by the President, make regulations for, and have control of, such examinations, and, through its members or the examiners, it shall supervise and preserve the records of the same; and said commission shall keep minutes of its own proceedings.

Fourth. Said commission may make investigations concerning the facts, and may report upon all matters touching the enforcement and effects of said rules and regulations, and concerning the action of any examiner or board of examiners hereinafter provided for, and its own subordinates, and those in the public service, in respect to the execution of this act.

Fifth. Said commission shall make an annual report to the President for transmission to Congress, showing its own action, the rules and regulations and the exceptions thereto in force, the practical effects thereof, and any suggestions it may approve for the more effectual accomplishment of the purposes of this act.

SECTION 6. . . . That from time to time said Secretary [of the Treasury], the Postmaster-General, and each of the heads of departments mentioned in the one hundred and fifty-eighth section of the Revised Statutes, and each head of an office, shall, on the direction of the President, and for facilitating the execution of this act, respectively revise any then existing classification or arrangement of those in their respective departments and offices, and shall, for the purposes of the examination herein provided for, include in one or more of such classes, so far as practicable, subordinate places, clerks, and officers in the public service pertaining to their respective departments not before classified for examination.

SECTION 7. That after the expiration of six months from the passage of this act no officer or clerk shall be appointed, and no person shall be employed to enter or be promoted in either of the said classes now existing, or that may be arranged hereunder pursuant to said rules, until he has passed an examination, or is shown to be specially exempted from such examination in conformity herewith. But nothing herein contained shall be construed to take from those honorably discharged from the military or naval service any preference conferred by the seventeen hundred and fifty-fourth section of the Revised Statutes, nor to take from the President any authority not inconsistent with this act conferred by the seventeen hundred and fifty-third section of said statutes; nor shall any officer not in the executive branch of the government, or any person merely employed as a laborer or workman, be required to be classified hereunder; nor, unless by direction of the Senate, shall any person who has been nominated for confirmation by the Senate be required to be classified or to pass an examination.

SECTION 8. That no person habitually using intoxicating beverages to excess shall be appointed to, or retained in, any office, appointment, or employment to which the provisions of this act are applicable.



SECTION 9. That whenever there are already two or more members of a family in the public service in the grades covered by this act, no other member of such family shall be eligible to appointment to any said grades.

SECTION 10. That no recommendation of any person who shall apply for office or place under the provisions of this act which may be given by any Senator or member of the House of Representatives, except as to the character or residence of the applicant, shall be received or considered by any person concerned in making any examination or appointment under this act.

SECTION 11. That no Senator, or Representative, or Territorial Delegate of the Congress, or Senator, Representative, or Delegate elect, or any officer or employee of either of said houses, and no executive, judicial, military, or naval officer of the United States, and no clerk or employee of any department, branch or bureau of the executive, judicial, or military or naval service of the United States, shall, directly or indirectly, solicit or receive, or be in any manner concerned in soliciting or receiving, any assessment, subscription, or contribution for any political purpose whatever, from any officer, clerk, or employee of the United States, or any department, branch, or bureau thereof, or from any person receiving any salary or compensation from moneys derived from the Treasury of the United States.

SECTION 12. That no person shall, in any room or building occupied in the discharge of official duties by any officer or employee of the United States mentioned in this act, or in any navy-yard, fort, or arsenal, solicit in any manner whatever, or receive any contribution of money or any other thing of value for any political purpose whatever.

SECTION 13. No officer or employee of the United States mentioned in this act shall discharge, or promote, or degrade, or in manner change the official rank or compensation of any other officer or employee, or promise or threaten so to do, for giving or withholding or neglecting to make any contribution of money or other valuable thing for any political purpose.

SECTION 14. That no officer, clerk, or other person in the service of the United States shall, directly or indirectly give or hand over to any other officer, clerk, or person in the service of the United States, or to any Senator or Member of the House of Representatives, or Territorial Delegate, any money or other valuable thing on account of or to be applied to the promotion of any political object whatever.

SECTION 15. That any person who shall be guilty of violating any provision of the four foregoing sections shall be deemed guilty of a



misdemeanor, and shall, on conviction thereof, be punished by a fine not exceeding five thousand dollars, or by imprisonment for a term not exceeding three years, or by such fine and imprisonment both, in the discretion of the court.

Approved, January sixteenth, 1883.

#### b. Classification Act of 1923

[*U. S. Statutes at Large*, vol. 42, pp. 1488-1499.]

CHAP. 265.—An Act To provide for the classification of civilian positions within the District of Columbia and in the field services.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That this Act may be cited as "The Classification Act of 1923."

SEC. 3. That there is hereby established an ex officio board, to be known as the Personnel Classification Board, to consist of the Director of the Bureau of the Budget or an alternate from that Bureau designated by the Director, a member of the Civil Service Commission or an alternate from that commission designated by the commission, and the Chief of the United States Bureau of Efficiency or an alternate from that bureau designated by the chief of the bureau. The Director of the Bureau of the Budget or his alternate shall be chairman of the board.

Subject to the approval of the President, the heads of the departments shall detail to the board, at its request, for temporary service under its direction, officers or employees possessed of special knowledge, ability, or experience required in the classification and allocation of positions. The Civil Service Commission, the Bureau of the Budget, and the Bureau of Efficiency shall render the board such cooperation and assistance as the board may require for the performance of its duties under this Act.

The board shall make all necessary rules and regulations not inconsistent with the provisions of this Act and provide such subdivisions of the grades contained in section 13 hereof and such titles and definitions as it may deem necessary according to the kind and difficulty of the work. Its regulations shall provide for ascertaining and recording the duties of positions and the qualifications required of incumbents, and it shall prepare and publish an adequate statement giving (1) the duties and responsibilities involved in the classes to be established within the several grades, illustrated where necessary by examples of typical tasks, (2) the minimum qualifications required for the satisfactory performance of such duties and tasks, and (3) the titles given to said classes. In performing

the foregoing duties, the board shall follow as nearly as practicable the classification made pursuant to the Executive order of October 24, 1921. The board may from time to time designate additional classes within the several grades and may combine, divide, alter, or abolish existing classes. Department heads shall promptly report the duties and responsibilities of new positions to the board. The board shall make necessary adjustments in compensation for positions carrying maintenance and for positions requiring only part-time service.

SEC. 4. That after consultation with the board, and in accordance with a uniform procedure prescribed by it, the head of each department shall allocate all positions in his department in the District of Columbia to their appropriate grades in the compensation schedules and shall fix the rate of compensation of each employee thereunder, in accordance with the rules prescribed in section 6 herein. Such allocations shall be reviewed and may be revised by the board and shall become final upon their approval by said board. Whenever an existing position or a position hereafter created by law shall not fairly and reasonably be allocable to one of the grades of the several services described in the compensation schedules, the board shall adopt for such position the range of compensation prescribed for a grade, or a class thereof, comparable therewith as to qualifications and duties.

In determining the rate of compensation which an employee shall receive, the principle of equal compensation for equal work irrespective of sex shall be followed.

SEC. 7. Increases in compensation shall be allowed upon the attainment and maintenance of the appropriate efficiency ratings, to the next higher rate within the salary range of the grade: *Provided however*, That in no case shall the compensation of any employee be increased unless Congress has appropriated money from which the increase may lawfully be paid, nor shall the rate for any employee be increased beyond the maximum rate for the grade to which his position is allocated. Nothing herein contained shall be construed to prevent the promotion of an employee from one class to a vacant position in a higher class at any time in accordance with civil service rules, and when so promoted the employee shall receive compensation according to the schedule established for the class to which he is promoted.

SEC. 8. That nothing in this Act shall modify or repeal any existing preference in appointment or reduction in the service of honorably discharged soldiers, sailors, or marines under any existing law or any Executive order now in force.

SEC. 9. That the board shall review and may revise uniform systems of efficiency rating established or to be established for the various grades or classes thereof, which shall set forth the degree of efficiency which shall constitute ground for (a) increase in the rate of compensation for employees who have not attained the maximum rate of the class to which their positions are allocated, (b) continuance at the existing rate of compensation without increase or decrease, (c) decrease in the rate of compensation for employees who at the time are above the minimum rate for the class to which their positions are allocated, and (d) dismissal.

The head of each department shall rate in accordance with such systems the efficiency of each employee under his control or direction. The current ratings for each grade or class thereof shall be open to inspection by the representatives of the board and by the employees of the department under conditions to be determined by the board after consultation with the department heads.

Reductions in compensation and dismissals for inefficiency shall be made by heads of departments in all cases whenever the efficiency ratings warrant, as provided herein, subject to the approval of the board.

. . . . .

SEC. 12. That it shall be the duty of the board to make a study of the rates of compensation provided in this Act for the various services and grades with a view to any readjustment deemed by said board to be just and reasonable. Said board shall, after such study and at such subsequent times as it may deem necessary, report its conclusions to Congress with any recommendations it may deem advisable.

SEC. 13. That the compensation schedules be as follows:

The professional and scientific service shall include all classes of positions the duties of which are to perform routine, advisory, administrative, or research work which is based upon the established principles of a profession or science, and which requires professional, scientific, or technical training equivalent to that represented by graduation from a college or university of recognized standing. [This service is subdivided into seven grades, with a scale of salaries for each grade.] . . .

The subprofessional service shall include all classes of positions the duties of which are to perform work which is incident, subordinate, or preparatory to the work required of employees holding positions in the professional and scientific service, and which requires or involves professional, scientific, or technical training of any degree inferior to that represented by graduation from a college or university of recognized standing. [This service is subdivided into eight grades, with a scale of salaries for each grade.] . . .

The clerical, administrative, and fiscal service shall include all classes of positions the duties of which are to perform clerical, administrative, or accounting work, or any other work commonly associated with office, business, or fiscal administration. [This service is subdivided into fourteen grades, with a scale of salaries for each grade.] . . .

The custodial service shall include all classes of positions the duties of which are to supervise or to perform manual work involved in the custody, maintenance, and protection of public buildings, premises, and equipment, the transportation of public officers, employees or property, and the transmission of official papers. [This service is subdivided into ten grades, with a scale of salaries for each grade.] . . .

The clerical-mechanical service shall include all classes of positions which are not in a recognized trade or craft and which are located in the Government Printing Office, the Bureau of Engraving and Printing, the Mail Equipment shop, the duties of which are to perform or to direct manual or machine operations requiring special skill or experience, or to perform or direct the counting, examining, sorting, or other verification of the product of manual or machine operations. [This service is subdivided into five grades, with a scale of salaries for each grade.]

. . . . .

Approved, March 4, 1923.

## 71. EXTENSION OF THE MERIT SYSTEM

The power to determine what positions in the national administration shall be placed under the civil service rules is vested primarily in Congress. That body has accordingly provided from time to time, as new offices or positions have been created, whether to include those in the system known as the classified service and in that way has extended the scope of the merit system. Congress has also given the President power to make rules governing the civil service, and to determine within certain limits the application of those rules. Obviously the President may also, if he chooses, impose conditions with respect to appointments to those offices filled by himself. Hence it is that the merit system has been extended to more and more offices by presidential order. President Cleveland, a vigorous exponent of the civil service, thus placed approximately 45,000 positions under the protection of the civil service rules during the four years of his second term, more than doubling the scope of the service. Similarly, other Presidents have made additions from time to time, the most notable of recent years being the inclusion of postmasters by Presidents Wilson and Franklin D. Roosevelt,<sup>1</sup> and a sweeping inclusion of virtually all possible positions by President Roosevelt.

<sup>1</sup> President Wilson, by an executive order of Mar. 31, 1917, and President Roosevelt, by an executive order of July 20, 1936, required the Postmaster General to submit to the President the name of the highest eligible person after a civil service examination; Presidents Harding, Coolidge, Hoover, and Roosevelt (by an earlier executive order of July 12, 1933) had modified this to require the submission of the three highest eligibles.

## a. Extension by Act of Congress

[Act of June 25, 1938. *Public No. 720, 75 Cong., 3 Sess. (H.R. 1531)*. Introduced in House by Mr. Ramspeck, Jan. 5, 1937; passed House Jan. 28, 1937; passed Senate as S. 3022, then amended House bill substituted, Apr. 11, 1938; conference report adopted by House June 11, by Senate June 14, 1938.]

## AN ACT

EXTENDING THE CLASSIFIED CIVIL SERVICE TO INCLUDE POSTMASTERS OF THE FIRST, SECOND, AND THIRD CLASSES, AND FOR OTHER PURPOSES.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That postmasters of the first, second, and third classes shall hereafter be appointed in the classified service without term by the President by and with the advice and consent of the Senate: *Provided*, That postmasters now serving may continue to serve until the end of their terms, but they shall not acquire a classified civil service status at the expiration of such terms of office except as provided in Section 2 hereof.

SEC. 2. Appointments to positions of postmaster at first-, second-, and third-class post offices shall be made by the reappointment and classification, non-competitively, of the incumbent postmaster, or by promotion from within the Postal Service in accordance with the provisions of the Civil Service Act and Rules, or by competitive examination, in accordance with the provisions of the Civil Service Act and Rules. No person shall be eligible for appointment under this section unless such person has actually resided within the delivery of the office to which he is appointed, or within the city or town where the same is situated for one year next preceding the date of such appointment, if the appointment is made without competitive examination; or for one year preceding the date fixed for the close of receipt of applications for examination, if the appointment is made after competitive examination.

SEC. 3. Appointments of acting postmasters in all classes of post offices shall be made by the Postmaster General: *Provided*, That acting postmasters shall serve not to exceed six months from the date of their designation, except that the Postmaster General may extend the period of service of any acting postmaster beyond such six months' period with the permission of the Civil Service Commission.

SEC. 4. All Acts or parts of Acts inconsistent herewith are hereby repealed.

Approved, June 25, 1938.



**b. General Extension by President Roosevelt**

[Executive Order of June 24, 1938. *Federal Register*, vol. 3, pp. 1526-1527 (June 28, 1938).]

**EXECUTIVE ORDER****EXTENDING THE COMPETITIVE CLASSIFIED CIVIL SERVICE**

By virtue of and pursuant to the authority vested in me by the Constitution, by Section 1753 of the Revised Statutes (U. S. C., Title 5, Section 631), by the Civil Service Act of January 16, 1883 (22 Stat. 403), and as President of the United States, it is hereby ordered as follows:

SECTION 1. Effective February 1, 1939, all positions in the Executive civil service, including positions in corporations wholly owned or controlled by the United States, which are not now in the competitive classified civil service and which are not exempted therefrom by statute, except (1) policy-determining positions and (2) other positions which special circumstances require should be exempted, are covered into the competitive classified civil service:<sup>1</sup> *Provided*, That this section shall not be deemed to apply to positions filled by appointment by and with the advice and consent of the Senate: *And provided further*, That no positions shall be exempted from the competitive classified civil service under clauses (1) and (2) above except such as shall be designated in subsequent Executive orders issued after investigation showing the necessity and justification for such exemptions. This section shall also apply to positions affected by statutes which exempt them from the competitive classified civil service but authorize the President in his discretion to cover them into such service.

SECTION 2. Within ninety days from the date of this order the heads of all departments and independent establishments, including corporations wholly owned or controlled by the United States, whose personnel or any part thereof is affected by Section 1 of this order, shall certify to the Civil Service Commission for transmission by it with its recommendations to the President the positions in their respective departments

<sup>1</sup> Acting on the advice of the Civil Service Commission, President Roosevelt, on Jan. 31, 1939, postponed the effective date of this order for something less than 10% of the positions, in order to give time to make the necessary adjustments within the executive departments. At the same time he appointed a committee of seven outstanding citizens, under the chairmanship of Associate Justice Stanley Reed of the Supreme Court, to study the best way of applying civil service principles to the professional, scientific, administrative, and technical positions. See Executive Order of Jan. 31, 1939 [No. 8044], in *Federal Register*, vol. 4, p. 497 (Feb. 2, 1939).



or agencies which in their opinion should be excepted from the provisions of Section 1 of this order as policy-determining or for other reasons.

SECTION 3. The incumbent of any position which is covered into the competitive classified civil service by Section 1 of this order shall acquire a classified civil service status (1) upon recommendation by the head of the agency concerned and certification by such head to the Civil Service Commission that such incumbent was in the service on the date of this order and has rendered satisfactory service for not less than six months, and (2) upon passing a suitable noncompetitive examination prescribed by the Civil Service Commission under the civil service rules: *Provided*, That he is a citizen of the United States and is not disqualified by any provision of law or civil service rule. Any such incumbent who fails to meet the foregoing requirements of this section shall be separated from the service within thirty days (exclusive of leave to which he is entitled) after the Commission reports that he is ineligible for classification unless the head of the agency concerned certifies to the Commission that such incumbent has rendered satisfactory service and that he should be retained although without acquiring a competitive classified status.

SECTION 4. New appointments to any positions covered into the competitive classified civil service by Section 1 of this order shall not be affected by the provisions of said section until the Civil Service Commission shall have established registers of eligibles for such positions as a result of examinations held in accordance with the civil service rules and regulations and with this order.

SECTION 5. The Civil Service Commission shall, subject to the Civil Service Act, the rules thereunder, and the Classification Act of 1923, as amended, initiate, supervise, and enforce a system as uniform as practicable, for the recruitment, examination, certification, promotion from grade to grade, transfer, and reinstatement of employees in the classified civil service, other than employees therein excepted by Executive orders, issued pursuant to clauses (1) and (2) of Section 1 hereof, which system shall, so far as practicable, be competitive, with due regard to prior experience and service.

SECTION 6. Effective not later than February 1, 1939, the heads of the Executive departments and the heads of such independent establishments and agencies subject to the civil service laws and rules as the President shall designate, shall establish in their respective departments or establishments a division of personnel supervision and management, at the head of which shall be appointed a director of personnel qualified by training and experience, from among those whose names are certified for such appointment by the Civil Service Commission pursuant to such

competitive tests and requirements as the Civil Service Commission shall prescribe: *Provided*, however, that if the head of a department or establishment requests authority to appoint a presently acting personnel or appointment director, officer, or clerk, as such director of personnel, such personnel or appointment director, officer, or clerk may be appointed upon certification by the Civil Service Commission that he is qualified therefor after passing such tests as the Civil Service Commission shall prescribe. It shall be the duty of each director of personnel to act as liaison officer in personnel matters between his department or establishment and the Civil Service Commission, and to make recommendations to the departmental budget officer with respect to estimates and expenditures for personnel. He shall supervise the functions of appointment, assignment, service rating, and training of employees in his department or establishment, under direction of the head thereof, and shall initiate and supervise such programs of personnel training and management as the head thereof after consultation with the Civil Service Commission shall approve, including the establishment of a system of service ratings for departmental and field forces outside of the Classification Act of 1923, as amended, which shall conform as nearly as practicable with the system established under the said Act. Subject to the approval of the head of such department or establishment and of the Civil Service Commission he shall establish means for the hearing of grievances of employees and present appropriate recommendations for the settlement thereof to the head of his department or establishment. He shall serve as a member of the Council of Personnel Administration hereinafter established, and perform such other functions as the head of the department or agency after consultation with the Civil Service Commission shall prescribe. A director of personnel may be transferred from one department or establishment to another from time to time, subject to the provisions of the civil service rules and with the approval of the head of the agency to which transfer is proposed.

SECTION 7. Effective February 1, 1939, there is established a Council of Personnel Administration consisting of the directors of personnel of the several departments and independent establishments, one additional representative of the Bureau of the Budget, one additional representative of the Civil Service Commission, and such additional members as the President shall designate. The President shall designate one of the members of the Council to act as chairman thereof, and the Council may designate an executive director. The Council shall advise and assist the President and the Commission in the protection and improvement of the merit system, and recommend from time to time to the President or the

Commission needed changes in procedure, rules, or regulations. When directed so to do by the President or the Commission, the Council shall hold hearings and conduct investigations with respect to alleged abuse and proposed changes. The Council shall carry on programs of study to coordinate and perfect the executive personnel service in all its branches, and shall report upon the progress of personnel administration throughout the service. The Council shall have an executive committee of five members: one representing the ten executive departments to be chosen by the Directors of Personnel thereof; one representing the independent establishments and agencies to be chosen by the Directors of Personnel thereof; one representing the Bureau of the Budget to be chosen by the Director thereof; one representing the Civil Service Commission to be chosen by it; and one to be designated by the President. Executive Order No. 5612 of April 25, 1931, is hereby revoked.

SECTION 8. The Civil Service Commission shall, in cooperation with operating departments and establishments, the Office of Education, and public and private institutions of learning, establish practical training courses for employees in the departmental and field services of the classified civil service, and may by regulations provide credits in transfer and promotion examinations for satisfactory completion of one or more of such training courses.

SECTION 9. Schedules A and B of the Civil Service Rules, as presently existing, relating to positions excepted from examination and positions which may be filled upon noncompetitive examination, will be superseded by schedules designating policy-determining positions and other positions which special circumstances require should be exempted, which schedules will be set forth in subsequent Executive orders as provided in section 1 hereof.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,  
June 24, 1938.

[No. 7916]

## 72. WORKING OF THE CIVIL SERVICE

Politicians have generally not been satisfied with the extensions of the civil service, since the system serves to remove offices from their control. Others have feared the extensions as tending to create a bureaucracy, or class of permanent office-holders, and as interfering seriously with the responsible and efficient operation of the government. On the other hand, proposals have been made to extend and strengthen the civil service system by a thorough reorganization of its management and methods.

## a. Report of Senate Committee

[Report of Senate Committee on Post Offices and Post Roads (S. Rept. No. 1296, 75 Cong., 2 Sess.). Text in *Congressional Record*, vol. 82, pt. 1, pp. 892-896 (Dec. 4, 1937).]

## AMENDING THE LAW RELATING TO APPOINTMENT OF POSTMASTERS

Mr. McKELLAR, from the Committee on Post Offices and Post Roads, submitted the following report to accompany S. 3022:

The Post Offices and Post Roads Committee of the Senate, to whom was referred the bill (S. 3022) to amend the law relating to appointment of postmasters, having considered the same, beg leave to report said bill back to the Senate with the recommendation that it be amended as hereinafter set out, and, upon being so amended, the committee recommend that said bill do pass.

[Then follow the detailed amendments, which required confirmation by the Senate and essentially restored the patronage system for all except fourth-class postmasterships.] . . .

Your committee further reports:

For a number of years there has been a more or less determined effort made by the Civil Service Commission to obtain control of the appointment of first-, second-, and third-class postmasters in the United States. There has been a great deal of propaganda in behalf of this proposal. In these circumstances it is necessary to give the history of the appointment of postmasters in the United States. Up until the act of July 12, 1876, all postmasters of all classes were appointed by the President by and with the consent of the Senate.

The statute of 1876 with reference to the appointment of postmasters reads as follows:

"Postmasters of the first, second, and third classes shall be appointed and may be removed by the President by and with the advice and consent of the Senate, and shall hold their offices for 4 years unless sooner removed or suspended according to law; and postmasters of the fourth class shall be appointed and may be removed by the Postmaster General, by whom all appointments and removals shall be notified to the General Accounting Office (39 U. S. Code 31)."

It will be noted that Presidential postmasters are to be appointed by the President by and with the consent of the Senate and fourth-class postmasters are to be appointed by the Postmaster General. Prior to 1917 the nominations of Presidential postmasters were made by the President without any assistance from the Civil Service Commission. As a matter of fact, when it was decided which of the applicants for

any particular office was to be selected, the nominations were sent up to the Senate without reference to or consultation with the Civil Service Commission. In 1917 President Wilson issued an Executive order which provided that when a vacancy occurred in the position of postmaster at any office of the first, second, or third class, as the result of death, resignation, removal, etc., that the Postmaster General should certify the fact to the Civil Service Commission which shall forthwith hold an open competitive examination to test the fitness of the applicants and that when the results of the examination had been certified to the Postmaster General he should submit to the President the name of the highest qualified eligible for appointment to fill the vacancy. This Executive order which was dated March 31, 1917, was amended April 13, 1920, to provide for the selection of a veteran if one had made an eligible rating instead of the highest eligible, this selection to be optional. This order was again amended October 8, 1920, to provide that the vacancy could be filled by the nomination of some person within the classified civil service who had the required qualifications.

Executive orders were issued by Presidents Harding, Coolidge, and Hoover, and in each instance these orders provided for the selection of one of the three highest eligibles. . . .

The present bill has been amended so as to conform to that provision in the Federal Constitution which reads:

"He (the President) shall nominate, and by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and *all other officers of the United States*, whose appointments are not herein otherwise provided for, and which shall be established by law; but the Congress may by law vest the appointment of *such inferior officers*, as they think proper, in the President alone, in the courts of law, or in the heads of departments (art. II, sec. 2, par. 2)."

Unless all postmasters are declared to be inferior officers, it is evident that to require the President to appoint the highest eligible certified by the Civil Service Commission will not only deny him his constitutional right of selection, but denies to the Senate its right of confirmation. . . .

The theory of well-meaning civil-service advocates is that the Civil Service Commission, being a nonpolitical body, will be more likely to secure a person in each community in the United States who will make a more efficient postmaster, and, having once secured such person, retain him in the service until his retirement for age or disability under law.

The objection to such a plan is that the method now in vogue of recommending first-, second-, and third-class postmasters is that a repre-



sentative of the Civil Service Commission is to be sent from Washington to the post office where the vacancy occurs and by such examination as he may personally choose to make recommend a suitable postmaster. Of course, in making this recommendation, education, general character, experience in management of employees, and fitness are supposed to be taken into consideration.

A more imperfect method of securing an efficient, honest, and desirable postmaster could hardly be imagined. A more direct blow to democratic home rule would be difficult to devise. A more effective building of centralized bureaucracy here in Washington could scarcely be conceived. The civil-service employee from Washington sent to make the examination would virtually have the power to appoint anyone whom he pleased as postmaster at the particular post office examined. He might or might not see the man appointed. He might take the advice and opinion of men entirely favorable to him and who, for this reason or that, good or bad, might want him appointed.

Of course, the civil-service representative would make a report, but such reports are secret and confidential, except to the Commission, which acts upon the report. In nine hundred and ninety-nine cases out of a thousand the Commission would appoint the person favorably recommended. The examining employee from Washington would be responsible to no one, except the Commission, and the Commission itself would be responsible to no one.

It is inconceivable that anyone could believe that the power of appointing all first-, second-, and third-class postmasters in the country should be centered in a bureau here in Washington or that a postmaster acceptable to the patrons of the local post office could be obtained, except by accident, by such a method of appointment.

On the other hand, under a system which has grown up during all the years of our Government, a postmaster, unless it be at the home of a Senator, is recommended by the Congressman to the Postmaster General or to the President, and the President sends his name to the Senate. If the man recommended is, in the opinion of the Senate, a proper man, he is confirmed. Later on in our history, the President sought the Civil Service Commission's assistance by having that Commission certify a list of the three highest eligibles, from which the Post Office Department makes a recommendation to the President and one of the three highest eligibles is then nominated. The Senate then confirms or rejects the nomination. This procedure has worked remarkably well.

In the first place, if a proper man is not recommended by the Representative in Congress the people have a right to hold him responsible by



their votes. If the Congressman makes a mistake, the Postmaster General or the President may interfere and recommend or appoint a proper man. Not only that, but if the Congressman, the Postmaster General, and the President all make a mistake and it is brought to the attention of the Senate, the Senate need not confirm such postmaster but may, and sometimes does, reject him. To my mind, this method of appointing postmasters is ideal, and it is one that has been tried out through all the years. It follows our constitutional system of checks and balances. It is the rarest thing that a postmaster goes wrong. Postmasters are responsible to the Congressman, or to the Senators where the office is in the Senator's home town, and, as a rule, they are a competent and efficient body of men.

Moreover, postmasters, thus appointed, have built up the Post Office Department into one of the finest governmental mechanisms that have been established in our country. Its efficiency and success are the pride of our Republic. There is no other post-office system in the world that is half so effective or so prompt. The loss of a letter is almost unheard of. The Postal System taken as a whole is virtually self-supporting.

Why undertake to tear down so splendid a system and substitute in its place a system of centralized bureaucracy? Why substitute inefficiency for efficiency? Why substitute an untried system for a tried system that has worked well? Why not let the localities have something to do with the selection of their own postmasters? Why repudiate entirely the doctrine of local self-government? Why is a Congressman, familiar with practically every person in his district, not better able to secure a good and efficient postmaster for a town where he is well known than is a civil-service clerk in Washington? The Civil Service Commission claims not to be a political body, yet it has been lobbying for this additional power for years.

Your committee is of the opinion that the system of selecting postmasters, in vogue before July 11, 1936, is the best practicable system that could be devised for getting the best, most efficient, most honest, and most satisfactory postmasters. It should be retained. Therefore, your committee recommends that Senate bill No. 3022, as amended, be enacted into law.

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#### MINORITY VIEWS OF MESSRS. O'MAHONEY, LOGAN, AND LA FOLLETTE

The bill reported by the majority and the alternatives offered by the minority represent a clear-cut issue between the patronage system on the one hand and the merit system on the other in the selection of post-

masters of the first, second, and third classes. The bills also present a clear-cut issue between the repudiation of party promises represented in the majority bill and the redemption of those promises represented in the substitute urged by the minority.

Beginning with Cleveland, every President has declared his support of the merit system and, in almost every campaign in recent years, both major political parties have likewise declared for the extension of civil service. In the campaign of 1936, both Presidential candidates and both parties declared in favor of the extension of the civil-service law to the selection of postmasters.

There is no mistaking the meaning of this pledge from the Democratic platform of 1936:

"For the protection of government itself and promotion of its efficiency we pledge the immediate extension of the merit system through the classified civil service—which was first established and fostered under Democratic auspices—to all non-policy-making positions in the Federal service.

"We shall subject to the civil-service law all continuing positions which, because of the emergency, have been exempt from its operation."

In this declaration the Democratic National Convention formally and solemnly boasted that the civil-service system "was first established and fostered under Democratic auspices." It is unthinkable that a Congress so completely dominated by the Democratic Party and a Senate in which that party holds the overwhelming majority it now has should deliberately discard that promise.

President Roosevelt has given emphatic proof of the sincerity of his intentions, first, by directing the Postmaster General in July 1933 to prepare legislation placing all postmasterships upon a statutory civil-service basis, and, second, by issuing an Executive order in July 1936 extending the merit system to the appointment of postmasters of the first, second, and third classes after Congress had failed to pass civil-service bills, which had been previously introduced with the approval of the administration.

On January 28, 1937, the House of Representatives passed a bill (H. R. 1531), commonly called the Ramspeck bill, which extended the civil-service law to the appointment of all postmasters of the first, second, and third classes. This measure provides that such postmasters shall be appointed without term by the Postmaster General, in accordance with the civil-service law and without confirmation by the United States Senate. It authorizes the reappointment of incumbents at the expiration of their current terms or the promotion of postal employees.

Post offices of the fourth class, namely, those in which the compensation is less than \$1,100 per year, are not mentioned in the Ramspeck bill. These appointments under existing law are made by the Postmaster General, but, under an Executive order of President Wilson, in accordance with civil-service rules. By passing this bill the House of Representatives carried out the pledge made by both parties to the people in the previous campaign. The bill reported by the majority repudiates this pledge, for if enacted it would restore the patronage system and, if carried out by the President, would destroy the whole effect of the existing Executive order.

This measure continues the system of Presidential appointment of postmasters of the first, second, and third classes for terms of 4 years, by and with the advice and consent of the Senate, authorizes the appointment of incumbents or the promotion of civil-service employees, and provides that the President "may request" the Civil Service Commission to hold an open competitive examination for the certification of three eligibles for appointment. There is no obligation upon the President under the terms of this measure to call at any time for a civil-service examination.

The only apparent concession to the merit system in the majority bill is the fact that section 2 extends to fourth-class offices by statute the civil-service protection now granted by Executive order. This, however, is not a concession at all, because fourth-class postmasters have been appointed under the civil-service rules and regulations without interruption since the Executive order of President Woodrow Wilson on May 7, 1913, and there is little possibility that any President would, by Executive order, undo the great benefits which have been derived from the establishment of the merit system in the selection of postmasters of this class.

The majority bill is frankly based upon the theory that all postmasters drawing salaries of \$1,100 or more should be selected by Members of the House of Representatives, except that Members of the Senate should have the right to name the postmasters in their home cities. This principle, of course, is qualified by the practical consideration that a Member of the House or a Member of the Senate who is not affiliated with the party in executive control of the Government is not permitted to make a recommendation. In such instances the recommendation is made by some proper member of the political hierarchy affiliated with the party in power.

The theory that Members of Congress should be permitted to appoint postmasters is in violation of our constitutional system, which pre-

scribes that officers of the United States shall be appointed by the President with the advice and consent of the Senate, except that "the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments" (art. II, sec. 2, clause 2).

The appointment of executive officers is an executive function and, when exercised by Members of Congress, through the acquiescence of the Executive, tends to deprive the legislative branch of the legislative freedom it ought to enjoy and preserve.

The fact that the majority bill proposes to extend by statute the benefits of the civil-service law to post offices of the fourth class is in fact a confession that the merit system should be extended to all postmaster-ships. No effort is made to supersede the Executive order by which some 32,000 fourth-class postmasters are given the protection of the civil service, because, in the first place, salaries of \$1,100 or less are not considered worthy of the effort of the mere job hunter; and, in the second place, because fourth-class postmasters have no assistants and must do the work themselves. Therefore, no one aspires to such appointments save those who can perform the task efficiently and to the satisfaction of the public.

In the cases of third-class postmasters, where assistants are needed, a financial allowance is made by the Department so that the prize to be dispensed in such cases is the salary, ranging from \$1,100 to \$2,400, plus an allowance for clerical assistance which is expended at the will of the postmaster.

Postal employees under the postmaster in all first- and second-class offices are appointed only under the civil-service law, but in all save about 2,000 of the first- and second-class offices, there are assistant postmasters, civil-service employees, in addition to the postmasters. These assistants are the postal experts who, in fact, in almost all cases actually have charge of the offices and do the postal work. It is highly significant that the salaries of assistant postmasters average approximately 40 percent less than the salaries of the postmasters under whom they serve. They hold on through one administration after another, while their immediate superiors change with every change of administration.

It is the belief of the minority that the salaries should go to the persons who actually do the work; that every postal employee, when he enters the Postal Service, should feel that by diligence and ability he could attain postmastership, and that, even when an administration changes, no political employee could come into the post office in which he works and begin immediately to receive a salary 40 percent in excess of that which

he receives. The extension of the merit system to the appointment of all postmasters could only have the effect of immediately improving the Postal Service. It would be an inspiration to every postal employee and, in the opinion of the minority, would be reflected at once in an increase of the efficiency and economy with which the mails are handled. From a purely parliamentary point of view the passage of the majority bill would be an effective impediment to any action at all, for the Senate measure, if sent to the House, would have to go through the whole legislative procedure from the beginning. If there is to be a postmasters' bill it should, therefore, be based upon the measure already passed by the House.

In the committee this minority offered an amendment of Senator McKellar's bill which, though extending the civil-service law to the appointment of all postmasters, provided for confirmation by the Senate in the cases of postmasters of the first, second, and third classes. Since this substitute (which is attached to this report and marked "Exhibit A") was rejected, the minority feels that the Ramspeck bill, amended to meet the suggestions contained in the letter of the Postmaster General to the chairman of the Committee on Civil Service, should be substituted for S. 3022. It is, therefore, recommended that H. R. 1531, amended as follows, be substituted for the bill reported by the majority: . . .

[Senator Bridges filed a separate minority opinion, agreeing in general with the views of Senators O'Mahoney, Logan, and La Follette. The views of the minority prevailed in the Senate.]

#### **b. Proposal of President's Committee**

*[Report of the President's Committee on Administrative Management (Jan., 1937), pp. 7-11.]*

### **II. PERSONNEL MANAGEMENT**

The merit system should be extended upward, outward, and downward to include all positions in the Executive Branch of the Government except those which are policy-determining in character. At the same time the civil-service administration should be reorganized into a central personnel agency under a single head and a nonpartisan citizen board appointed to serve as a watchdog of the merit system.

Personnel administration lies at the very core of administrative management. The effective conduct of the work of the Government depends upon the men and women who serve it. Improved plans for gov-



ernmental organization and management are of little value unless simultaneous recognition is given to the need for attracting, retaining, and developing human capacity in the public service.

After more than 50 years of experience with civil service in Federal, State, and local governments, there is overwhelming evidence to show that the original theory of merely protecting appointments from political influence through a legalistic system of civil-service administration is inadequate to serve democratic government under modern conditions. There is still need for protection, but the urgent new need today is for the development of a real career service through positive, constructive, modern personnel administration. The functions that the Federal Government has been called upon to perform are increasingly numerous, technical, and difficult. It is today the world's largest and most intricate administrative establishment.

A thoroughgoing modernization and extension of personnel administration is required. The great need of American democratic institutions is an able civil service.

#### A. EXTENSION OF THE MERIT SYSTEM

Democratic government today, with its greatly increased activities and responsibilities, requires personnel of the highest order—competent, highly trained, loyal, skilled in their duties by reason of long experience, and assured of continuity and freedom from the disrupting influences of personal or political patronage. To meet this requirement the merit principle should be extended to all except the highest governmental positions. To this course both of the great political parties are pledged. The merit system should be extended in three ways:

Upward to include all permanent positions in the Government service except a very small number of a high executive and policy-forming character;

Outward to include permanent or continuing positions not now under civil service, whether located in new or emergency agencies or in the older departments; and

Downward to include skilled workmen and laborers in the regular Government service.

This task, however, is by no means simple and must not be attempted with undue haste. To bring within the classified service large groups of employees engaged in activities that are clearly temporary would be unwise. Care must be taken that in the process of extending the merit system, personnel standards are not lowered and that, at the same time,



fair treatment is accorded to those who have demonstrated their ability in Government service.

The United States Government is the largest single employer of personnel. With the rapid growth of the country and the constant increase in the services rendered to its citizens by the Government, the number of Federal employees has steadily increased. This trend has been equally true of governments throughout the world.

During the depression the number of Federal employees markedly increased because of the requirements of the new and emergency activities undertaken by the Government. Most of these new employees were recruited outside of the civil-service system. From June 30, 1932, to June 30, 1936, the civilian employees of the Executive Branch increased from 578,231 to 824,259. The number of employees in the classified service increased from 467,161 to 498,725, whereas the unclassified employees increased from 111,070 to 325,534.

The Civil Service Commission was not given either the authority or the necessary funds and staff to enable it to meet the requirements of Government agencies in recruiting quickly the large number of employees required in the emergency period. Now we are coming to the end of the emergency period. Some undertakings will be liquidated and continuing functions will be placed in the regular structure of the Government. As these steps are taken the classified civil service should be extended to the continuing activities.

In a democracy it is essential that the very highest posts be filled by the Chief Executive with persons who support his program and policies, and in whom he has entire confidence. Only in this way is it possible to exercise democratic control over the permanent civil service, to avoid the dangers of bureaucracy, and to translate the mandate of the people at the polls into responsible governmental policies. There must always be a sufficient number of high policy-determining posts at the disposal of a newly elected President to enable him and his administration to control the service. The positions which are actually policy-determining, however, are relatively few in number. They consist, in the main, of the heads of executive departments, under secretaries and assistant secretaries, the members of the regulatory commissions, the heads of a few of the large bureaus engaged in activities with important policy implications, the chief diplomatic posts, and a limited number of other key positions.

However, the great majority of the highest positions in the Federal service are not policy-determining in character but still remain outside the merit system. Most of them would benefit if filled by persons hav-

ing long and continuous service in the Government. Many require the utmost loyalty and probity because of their large responsibilities. They cannot be satisfactorily filled by appointment from private life every time the Administration changes.

The extension of the civil service upward to these higher administrative posts is a necessary and important step in the development of a career service which will attract and retain persons of high competence in the Government. Many promising employees leave the service because of its promotional limitations or remain at a heavy sacrifice. An increase in the number of higher posts included in the civil service will lift its entire morale and will give an incentive for the recruitment of the best talent in the lower positions.

Incumbents in positions affected by the extension of the merit system should not be blanketed into the classified civil service without a review of their qualifications. Such action would violate the basic principle of the merit system and would weaken and discredit the civil service. On the other hand, to require these employees to obtain civil-service status through open, competitive examinations might result in loss of the services of many individuals who have developed in their work experience and competence of distinct value to the Government. A solution at once satisfactory to the Government and fair to the incumbents would be to permit them to obtain classified civil-service status by passing noncompetitive tests of fitness prescribed by the head of the central personnel agency. In every case the head of the responsible department should certify that the employee has served with merit.

The continued requirement that the personal attention of the President be given to the filling of numerous positions adds to the burden of the Chief Executive and does not advance in any way the efficiency of the service. Of the 40,000 positions in the Executive Branch subject to direct appointment by the President there are about 25,000 which are of a military or foreign service type having merit systems of their own and excluded from consideration here. The remaining 15,000 civilian positions are mostly in the field and are subordinate in importance to appointments long made by department heads. They include almost 14,000 postmasters and 400 other field positions, such as United States marshals, collectors of internal revenue, and customs collectors.

The multiplicity of Presidential appointments defeats the power of the Chief Executive to control his establishment. Instead of increasing his control over personnel, it operates to weaken and dissipate his authority. It places him in a position of direct responsibility for many appointments

which he has little time to consider and robs him of time urgently needed for attention to important executive duties. It interferes with the authority that should be vested in the heads of the several departments for the proper discharge of their responsibilities. It is difficult for them to maintain appropriate relationships, discipline, and morale when their subordinates feel that they have direct and immediate responsibility to the President who appointed them. Conflicts of interest and jurisdiction within departments frequently result.

From every point of view, therefore, direct appointments by the President should be reduced to a very small number of only the highest positions. The continued appointment by the President of field officials, such as postmasters, United States marshals, collectors of internal revenue, and collectors of customs is not only antiquated, but prejudicial to good administration. Furthermore, fixed statutory terms of appointment now required for these positions are an obsolete practice and should be abolished.

### *Recommendations*

In order to extend the merit system we recommend that :

1. The merit system should be extended to positions in new and emergency agencies whose activities are to continue, and the President should be authorized to place such positions, including those in governmental corporations, in the classified civil service.
2. The merit system should be extended to permanent high posts and all other civilian positions in the regular departments and establishments. Exceptions should be made only in the case of such of the highest positions as the President may find to be principally policy-determining in character.
3. The merit system should be extended to the lowest positions in the regular establishments including those filled by skilled workmen and laborers.
4. The incumbent of any position which is placed within the classified civil service should receive civil-service status only after passing a special noncompetitive examination, following certification by the head of his agency that he has served with merit.
5. All civilian positions in regular departments and establishments now filled by Presidential appointment should be filled by the heads of such departments or establishments, without fixed term, except under secretaries and officers who report directly to the President or whose appointment by the President is required by the Constitution.

## B. REORGANIZATION AND IMPROVEMENT OF PERSONNEL ADMINISTRATION

The extension of the merit system in the Federal Government requires the reorganization of the Civil Service Commission as a central personnel agency. The Civil Service Commission was established over 50 years ago to meet conditions quite different from those of today. The number of Government employees was small and personnel requirements were relatively simple. Set up as an agency to protect the Federal executive establishment against the evils of political patronage, it has made many notable advances. The Civil Service Commission and its staff have devoted themselves assiduously to the public business and have endeavored conscientiously to observe the statutes and orders that have been laid down for their guidance. The Commission has achieved its greatest success in the administration of open competitive examinations for positions in the lower grades of the service. It has pioneered in personnel research and efficiency ratings. Its new series of general-purpose examinations for recent college graduates to fill positions at the bottom of the career ladder was a marked step forward and has resulted in improved recruitment for positions requiring general ability and capacity for development.

Nevertheless, the existing civil-service system is poorly adapted to meet the larger responsibilities of serving as a central personnel agency for a vast and complicated governmental administration in which there are over 800,000 civilian employees. Its organization is unsuited to the present needs. The Civil Service Commission has not been appropriately staffed to do the constructive work which modern personnel management presupposes. The absence of an adequate staff has imposed upon the Commission a negative, protective, and legalistic role, whereas the need today is for a positive, constructive, and active central personnel agency.

The board form of organization is unsuited to the work of a central personnel agency. This form of organization, as stated elsewhere in this report, has everywhere been found slow, cumbersome, wasteful, and ineffective in the conduct of administrative duties. Board members are customarily laymen not professionally trained or experienced in the activities for which they are responsible. They remain in office for relatively short periods and rarely acquire the degree of expertness necessary to executive direction. The board form of organization also has a serious internal weakness. Conflicts and jealousies frequently develop within a board and extend downward throughout the organization,

causing cliques and internal dissensions disrupting to morale and to work. Board administration tends to diffuse responsibility, to produce delays, and to make effective cooperation or vigorous leadership impossible. The history of the Civil Service Commission has been no exception to this general rule.

Federal personnel management, therefore, needs fundamental revision. The Civil Service Commission should be reorganized into a Civil Service Administration, with a single executive officer, to be known as the Civil Service Administrator, and a nonsalaried Civil Service Board of seven members appointed by the President. This Board would be charged not with administrative duties but with the protection and development of the merit system in the Government. The functions of the Administrator and the Board are outlined below.

The adoption of the plan of a single-headed executive for the central personnel agency would give it a degree of unity, energy, and responsibility impossible to obtain in an administrative agency headed by a full-time board of several members. The Administrator should be selected on a competitive, nonpartisan basis by a special examining board designated by the Civil Service Board and should be appointed by the President, with the advice and consent of the Senate, from the three highest candidates passing the examination conducted to fill the post. In this manner careful attention would be given to the professional and technical qualifications required by the office and the merit principle would be extended to the very top of the Civil Service Administration. The President should be able to remove the head of this managerial agency at any time but would be required to appoint his successor in the manner stated above.

The Civil Service Administrator would take over the functions and activities of the present Civil Service Commission. In addition, he would act as the direct adviser to the President upon all personnel matters and would be responsible to the President for the development of improved personnel policies and practices throughout the service. From time to time he would propose to the President needed amendments to the civil-service rules and regulations. He would suggest to the President recommendations for civil-service legislation and would assume initiative and leadership in personnel management.

It would be a special responsibility of the Civil Service Administrator to stimulate and aid the departments and bureaus in the establishment and development of able personnel staffs. Personnel management at the departmental and bureau level is exceedingly important. The administrative and professional staffs of the central personnel agency and



of the personnel offices of operating establishments should be regarded collectively as a unified career service of personnel administration.

The Administrator should strengthen and vitalize the present Council of Personnel Administration as a professional advisory group within the Government. He should act as chairman of the council and should develop it as a special instrument for the formulation of constructive personnel policies and standards.

The Administrator should give particular attention to a number of important aspects of personnel administration which are now inadequately performed. These include training within the service, the facilities for transfer as a means of utilizing more completely the personnel resources of the Government, the development of executives, the promotion system, examinations for higher positions, and cooperation with the personnel agencies of State and local governments.

Personnel management is an essential element of executive management. To set it apart or to organize it in a manner unsuited to serve the needs of the Chief Executive and the executive establishments is to render it impotent and ineffective. It may be said that a central personnel managerial agency directly under the President, with the primary duty of serving rather than of policing the departments, would be subject to political manipulation and would afford less protection against political spoils than a Civil Service Commission somewhat detached from the Administration. This criticism does not take into account the fact that the Civil Service Commission today is directly responsible to the President; its members are appointed by him and serve at his pleasure; they are not independent of the President and could not be made so under the Constitution. The reorganization of the Civil Service Commission as a central personnel managerial agency of the President would greatly advance the merit principle in the Government and would lead to the extension of civil service.

The valuable services that can be performed and the contributions that can be made by a lay board representing the public interest in the merit system should not be sacrificed, even though responsibility for actual administration is vested in a single Administrator. The placing of large powers of administration in one official makes it essential to preserve the values of vigilance and criticism that, in a large measure, have been afforded by the rotation in office of lay civil-service commissioners who have hitherto supervised the staff work.

A fundamental flaw in the present organization of the Commission would be removed by the establishment of an Administrator and a Board. The Commission is now obliged both to administer and to appraise and



criticize its own administration. These functions are basically incompatible. An effective appraisal, critical and constructive, must be entirely detached from execution.

The usefulness of a lay Board is not confined to its function as a watchdog of the merit system. From the more constructive angle of supporting progressive programs in the Federal personnel administration, a Board of lay advisers properly chosen can be a continual leaven. It can serve to focus the spotlight of public opinion on the human side of government. It can enlist the interest and cooperation of business, agriculture, labor, education, and the professions in improving the Government service as a career. It can stimulate the initiation of progressive personnel programs and serve as a critic which will protect the service from the dangers of bureaucracy, spoils, and deadly routine. It can advise the President and the Congress on weaknesses in personnel administration, policies, and practices.

In order to achieve its utmost usefulness, such a Board must be entirely divorced from partisan influences and from administrative or operating functions of any kind; it should be nonpartisan instead of bipartisan. Its members should be drawn in, from time to time, from active participation in various fields of endeavor so that they do not become too closely attached to the Government establishment or too closely identified with any Administration.

### *Recommendations*

In order to effect the reorganization of the civil service administration of the United States, we recommend that:

1. A United States Civil Service Administration should be established to serve as the central personnel agency of the Federal Government. The officers of the Administration should consist of a single executive officer to be known as the Civil Service Administrator and a nonsalaried Civil Service Board of seven members, with the powers and duties outlined below.

2. The Administrator should be highly competent, should possess a broad knowledge of personnel administration, and should be a qualified and experienced executive. He should be appointed by the President, with the advice and consent of the Senate, on the basis of an open competitive examination conducted by a special board of examiners appointed by the Civil Service Board. He should be responsible to and hold office at the pleasure of the President.

3. The duties, powers, functions, and authority now vested in the Civil Service Commission should be transferred to the Administrator. Authority should be given to the Administrator to develop and perform the additional functions which should be performed by an adequate central personnel agency. He should be authorized to participate in employee training programs; to make, or to cooperate with other groups in making, studies or investigations of personnel policies, practices, procedures, and methods in other governmental jurisdictions and in industry; and to cooperate with State and local personnel agencies and with independent agencies and corporations of the Federal Government. The Civil Service Administration should be authorized to render services to outside governmental units under suitable provision for reimbursement for the actual cost of such services.

4. The Civil Service Board should consist of seven members, appointed by the President, with the advice and consent of the Senate, for overlapping terms of 7 years. This Board should be composed of outstanding men and women drawn from private business, education, labor, agriculture, public administration, and professional life. No person should be eligible for membership if at any time within 5 years preceding the date of his appointment he has been a member or officer of any local, State, or national political party committee or has held, or been a candidate for, any elective public office. Members of the Board should receive no salaries, but they should be reimbursed for their actual time and expenses, plus the cost of transportation.

5. The Board should meet not less than four times a year upon call by the President, the chairman of the Board, or any four members of the Board. It should have authority and funds to employ temporary personnel for special investigations in addition to secretarial, clerical, and other necessary services provided by assignment from the staff of the Administrator.

6. The functions of the Civil Service Board should be:

*a.* To act as watchdog of the merit system and to represent the public interest in the improvement of personnel administration in the Federal service.

*b.* To appoint a special board of qualified examiners whenever there is a vacancy in the office of the Civil Service Administrator in order to conduct a new open competitive examination for the office, and to certify to the President the names of the three highest candidates.

*c.* To advise the President as to plans and procedures for dealing

with Federal employment questions which cannot be handled satisfactorily through established channels.

*d.* To propose to the President or to the Administrator amendments to the rules for the administration of the Federal civil service and to review and comment upon amendments proposed by the Administrator.

*e.* To make annual and special reports to the President and the Congress on the quality and status of the personnel administration of the Federal Government and to make recommendations on possible improvements in the laws or the administration of matters affecting Federal personnel. In this connection, the Board should have powers to undertake special investigations.

*f.* To act in an advisory capacity upon the request of the President or the Administrator on matters concerning personnel administration.

*g.* To study and report from time to time upon the relations of the Federal Civil Service to the merit system in State and local jurisdictions, particularly with reference to State and local activities in which there is Federal participation through grants-in-aid.

*h.* To advise and assist the Administrator in fostering the interest of institutions of learning, civic and professional organizations, and labor and employee organizations in the improvement of personnel standards in the Federal service.

## CHAPTER XII

### CONGRESS: SELECTION AND STRUCTURE

#### 73. SEATING OF MEMBERS

The Constitution makes each house "the judge of the qualifications, elections, and returns of its own members," which gives each house the power (1) to settle contests, (2) to refuse to seat, (3) to declare a seat vacant. A number of cases have arisen, affecting both houses, in which the house concerned has been compelled to decide to what extent this power should be exercised. On the one hand it is asserted that all that the houses may do is to determine whether the person seeking a seat has been actually elected and has the constitutional qualifications; on the other hand, it is claimed that the houses have the right to exclude persons who may for moral or ethical reasons or reasons of sound public policy be considered as unfit for membership. Among the cases of most importance are those of Victor Berger (Socialist; Wis.), elected to the House in 1918, although at the time under conviction for opposing the war and violating the Espionage Act (a conviction later reversed by the Supreme Court); of Truman H. Newberry (Republican; Mich.), elected to the Senate in 1918, after the expenditure in the campaign of sums greatly in excess of that allowed by either the Michigan or federal statutes; and of Frank L. Smith (Republican; Ill.), elected to the Senate in 1926 (and after the election appointed to fill a vacancy), after revelations of large contributions to his campaign by the utility interests, Smith at the time being also the Chairman of the Illinois Commerce Commission, a body having as its primary function the regulation of these same interests.

Berger was refused his seat on November 10, 1919, by a vote of 311-1. He was overwhelmingly reelected at the special election that followed, but was again (January 10, 1920) denied his seat by a vote of 330-6. Being elected again at the regular election of 1922, and his conviction having in the meantime been reversed by the Supreme Court, he was seated by the House. Newberry was given the oath of office when the Senate to which he was elected first convened, and later (January 12, 1922) was formally declared entitled to his seat by a close vote (46-41), although at the same time the Senate severely condemned the practices and expenditures in connection with his election. "Newberryism" became a leading issue in the campaign of that same year, and most of the Senators up for reelection who had voted to seat him having been defeated, Senator Newberry resigned shortly after the election. The most notorious of these cases, however, is that of Frank L. Smith. Senator McKinley, whom Smith had beaten for the Republican nomination, and whose term was about to expire, died shortly after the November election, whereupon the governor of Illinois appointed Smith to fill the vacancy. The Senate refused by a vote of 48-33 to give Smith the oath pending an investigation of his right to a seat under such appointment, and the matter was pressed no further. With the opening of the new Congress in December, 1927, Smith again presented his credentials, now by virtue of his election in 1926. He was

again refused the oath, and finally, on January 19, 1928, was formally denied his seat by a vote of 61-23. Mr. Smith and Governor Small both at first refused to recognize the existence of a vacancy, but later Smith "resigned" and was promptly reappointed by the governor. He made no attempt, however, to secure his seat under this appointment, but instead ran for renomination in an effort to secure a "vindication," and was defeated by a large majority.

#### a. Joint Resolution of Illinois Legislature

[*Laws of Illinois, 1927, pp. 884-886.*]

(House Joint Resolution No. 45)

*Resolved, by the House of Representatives of the State of Illinois, the Senate concurring herein:*

*Whereas, The Seventeenth Amendment of the Constitution of the United States makes mandatory that "The Senate of the United States shall be composed of two Senators from each state, elected by the people thereof, for six years;" and by reason of this constitutional provision the State of Illinois is entitled to, and guaranteed two Senators in the Senate of the United States; and*

*Whereas, On or about the seventh day of December, A. D. 1926, the Hon. William B. McKinley, one of the United States Senators representing the State of Illinois in the United States Senate, departed this life, and thereupon by reason of this vacancy, the Hon. Frank L. Smith was in accordance with the Constitution and statutes appointed to fill the unexpired term of said William B. McKinley as United States Senator from Illinois, and the said Hon. Frank L. Smith presented the credentials in proper form under the great seal of the State of Illinois, to the United States Senate, and the United States Senate, without questioning the legal form and force of said credentials, nor questioning the constitutional qualifications of the said Hon. Frank L. Smith, nor the guaranteed right under the Constitution of the United States for full representation to membership in United States Senate by the State of Illinois, refused to administer the oath of office to the said Hon. Frank L. Smith, and by that act denied to the State of Illinois equal representation in the said Senate of the United States; and*

*Whereas, For a period of nearly one hundred forty years, since the adoption of the Constitution of the United States and the amendment recited above, the rights of a sovereign state to equal representation in the Senate of the United States, wherein the credentials and constitutional qualifications were unquestioned, has never before been denied by the Senate of the United States refusing to administer the constitutional oath of office; and*



*Whereas*, This same question on an objection to the right of a Senator-elect to take the prescribed constitutional oath of office was once before raised against the State of Illinois, but upon the able representation of the constitutional rights of the State of Illinois by Hon. Stephen A. Douglas, Senior Senator from Illinois, in the matter of the credentials of General James Shields, a Senator-elect from Illinois, the United States Senate finally declared that the guaranteed constitutional rights of a sovereign state should not be abridged by a denial of the right of a Senator-elect to take the oath, and by this action established an historic precedent; and

*Whereas*, One of the early proposed amendments to the Constitution making it possible for United States Senators to be elected by a direct vote of the people was advocated by Senator John M. Palmer of Illinois, and subsequently became a part of the fundamental law of the land; and

*Whereas*, The said Hon. Frank L. Smith has been by majority of the people of the State of Illinois, after a full presentation, discussion and consideration of all issues involved, elected as a Senator of the United States from the State of Illinois, and no contest has issued against said election, and credentials have been accepted by the United States Senate as being in due form, and the qualifications of the said United States Senator-elect are in full compliance with all constitutional and statute requirements; and [here follow citations of the pertinent constitutional provisions—Art. I, sec. 3, cl. 3; 17th Amendment; Art. V; Art. I, sec. 5, cl. 1–2; 10th Amendment].

*Whereas*, The foregoing are all of the relevant provisions in the Constitution with respect to the power of the Senate over the selection of Senators; and

*Whereas*, The credentials of the said Hon. Frank L. Smith hereinbefore recited, constitute a mandate of the choice of a majority of the people of the State of Illinois at a general election, and which selection and choice by a majority of the people of the State of Illinois is uncontested, and that said election is for a period of six years, and that the continued refusal of the Senate of the United States to administer the oath of office to the said Hon. Frank L. Smith as United States Senator from Illinois, will result in depriving the State of Illinois of the full representation in the Senate of the United States for a period of six years, to which it is by the Constitution of the United States entitled and guaranteed; therefore, be it

*Resolved*, by the People of the State of Illinois, represented in the General Assembly, That in view of the foregoing, it be respectfully presented to the Senate of the United States of the Seventieth Congress,



that the people of the State of Illinois are clearly within their rights in the expectation that the credentials of the Hon. Frank L. Smith now on file in the Senate of the United States, entitle the said Hon. Frank L. Smith to take the oath of office to which he has been elected as a United States Senator from the State of Illinois; and, be it further

*Resolved*, That a copy of this resolution be directed to the Vice President of the United States, the constitutional presiding officer of the United States Senate, and a copy of this resolution be transmitted to the Hon. Charles S. Deneen, Senior United States Senator from Illinois, with the request and direction that these resolutions be presented to the Senate of the United States, to the end that the sovereign State of Illinois shall not be deprived of the rights of full representation in the Senate of the United States, as guaranteed by the Constitution of the United States; and, be it further

*Resolved*, That a delegation on the constitutional rights of the State of Illinois be, and the same is hereby created, the said delegation to consist of the Speaker of the House of Representative, the President of the Senate, and two members of the House of Representatives to be appointed by the Speaker thereof, and two members of the Senate, to be appointed by the President of the Senate on the nomination of the Executive Committee, and it shall be the duty of said delegation on the constitutional rights of the State of Illinois to appear before the Senate of the United States, or any of its committees or sub-committees, upon the convening of said Senate and at any time thereafter, and to present to said Senate and its committees a consideration of the constitutional rights of this State, and on behalf of the people of this State respectfully to insist upon a recognition by the Senate of the United States of the constitutional right of this State to be represented in the Senate of the United States by two Senators, and that said constitutional right be recognized by the administration of the oath to the Hon. Frank L. Smith as United States Senator from this State.

Adopted by the House, June 16, 1927.

Concurred in by the Senate, June 21, 1927.

#### **b. Senate Resolution**

[Adopted Jan. 19, 1928, by vote of 61-23. *Congressional Record*, vol. 69, pt. 2, p. 1718.]

Whereas, on the 17th day of May, 1926, the Senate passed a resolution creating a special committee to investigate and determine the improper use of money to promote the nomination or election of persons to the

United States Senate and the employment of certain other corrupt and unlawful means to secure such nomination or election ;

Whereas, said committee in the discharge of its duties notified Frank L. Smith, of Illinois, then a candidate for the United States Senate from that State, of its proceedings and the said Frank L. Smith appeared in person and was permitted to counsel with and be represented by his attorneys and agents ;

Whereas, the said committee has reported :

That the evidence, without substantial dispute, shows that there was expended, directly or indirectly, for and on behalf of the candidacy of the said Frank L. Smith, for the United States Senate, the sum of \$458,782 ; that all of the above sum except \$171,500 was contributed directly to and received by the personal agent and representative of the said Frank L. Smith with his full knowledge and consent ;

That of the total sum aforesaid there was contributed by officers of large public service institutions doing business in the State of Illinois or by said institutions the sum of \$203,000, a substantial part of which sum was contributed by men who were non-residents of Illinois, but who were officers of Illinois public service corporations ;

That at all of the times aforesaid the said Frank L. Smith was chairman of the Illinois Commerce Commission, and that said public service corporations, commonly and generally, had business before said commission, and said commission was, among other things, empowered to regulate the rates, charges, and business of said corporations ;

That by the statutes of Illinois it is made a misdemeanor for any officer or agent of such public service corporations to contribute any money to any member of said commission or for any member of said commission to accept such moneys upon penalty of removal from office ;

That said Smith has in no manner controverted the truth of the foregoing facts, although full and complete opportunity was given to him, not only to present evidence, but arguments in his behalf ; and

Whereas, the said official report of said committee and the sworn evidence is now and for many months has been on file with the Senate, and all of the said facts appear without substantial dispute ; Now, therefore, be it

*Resolved*, That the acceptance and expenditure of the various sums of money aforesaid in behalf of the candidacy of the said Frank L. Smith is contrary to sound public policy, harmful to the dignity and honor of the Senate, dangerous to the perpetuity of free government, and taints with fraud and corruption the credentials for a seat in the Senate presented by the said Frank L. Smith ; and be it further

*Resolved*, That the said Frank L. Smith is not entitled to membership in the Senate of the United States, and that a vacancy exists in the representation of the State of Illinois in the United States Senate.

**c. Statement of Governor Small**

[*Chicago Tribune*, Jan. 21, 1928.]

The attempt of the United States senate to declare a vacancy in the constitutional representation of Illinois in the United States senate is, in my judgment, wholly unwarranted, and constitutes a dangerous attempt to nullify the rights of a sovereign state and the people thereof.

By the death of the late Hon. William B. McKinley, a vacancy was created in the representation of Illinois in the senate of the United States, in the 69th congress. The governor of Illinois, clearly within his constitutional rights and duty, appointed Hon. Frank L. Smith, on the sixteenth day of December, 1926, to fill that vacancy.

The manner of appointment and credentials predicated thereon were in due legal form, and the senator-designate possessed all constitutional qualifications.

For the first time in the history of our government, where such credentials and qualifications were unquestioned, the bearer thereof was denied the right to take the oath of office. Though the senate well knew that those credentials of appointment were not predicated upon a primary or an election, but on a lawful exercise of the appointing power, yet the United States senate denied the constitutional right of Illinois to equal, full and continuous representation during the remainder of the 69th congress. Thereafter Hon. Frank L. Smith, then and now a citizen of highest standing and reputation and enjoying the confidence of the people of our state, was nominated in the Republican primary, and subsequently elected United States senator at the general election in November, 1926, by the voters of Illinois, and neither the primary or election having been contested, holds the credentials for a full term of six years, beginning with the 70th congress. Such credentials were passed upon by the regular committee on Privileges and Elections of the United States senate, and reported to be in legal form, and by this action Hon. Frank L. Smith was accorded the right and privileges of a United States senator.

Senator-elect Frank L. Smith then again presented himself as the duly elected senator from Illinois at the bar of the senate to take the

required constitutional oath of office, at the commencement of the seventieth congress, on Dec. 5, 1927. When the senate by the adoption of a resolution, prevented the senator-elect of Illinois from taking the oath and when yesterday it purported to declare a vacancy in the representation of Illinois in the senate of the United States, the senate completed its effort to nullify the guaranteed rights of a sovereign state, and offered an affront to the people of Illinois.

As governor of Illinois, and in behalf of our people, I desire to express an unqualified resentment of this unwarranted assumption of authority by the United States senate in infringing on the rights of a free people to select a senator of their own choice.

The governor of Illinois holds that the rights of the several sovereign states which formed the federal union and adopted the constitution of the United States, are the very foundation of our national existence and destiny, and no right is more essential than the right of the states, as such, to express their views by two senators of their own selection.

The credentials of Frank L. Smith as United States senator from Illinois were bestowed on him by the people, who have entrusted him with the great responsibility of vindicating and protecting their equal rights as people of a free country.

I have read with deep interest and heartily approve of his courageous and patriotic statement before the senate committee, in which he refused to trade off the rights of Illinois. The splendid response and commendation from the people of Illinois of the position taken by him in their behalf and in protecting sovereign rights of his state has been so general throughout the state that even the barriers of partisanship have been swept away. This universal expression of sentiment lends strength to my plain duty in this expression of the attitude of the state of Illinois.

## **74. MEMBERS OF CONGRESS AND PUBLIC OFFICE**

Although the Constitution forbids members of Congress to hold at the same time any other office under the United States, that provision has been interpreted so as to permit the naming of Senators and Representatives to various types of offices, such as treaty commissions and the like. However, there has always been considerable opposition to the practice, and when President Harding, in 1922, appointed Senator Smoot and Representative Burton as members of the World War Foreign Debt Commission created by Congress to fund the war debts, there was vigorous debate in the Senate and a hostile committee report, on the ground that these members of Congress were constitutionally ineligible. The appointments were finally confirmed (on April 11, 1922) by a vote of 47-25.

**a. Opinion of Attorney General Daugherty**

[*Congressional Record*, vol. 62, pp. 5268-5269.]

Department of Justice,  
Office of the Attorney General,  
Washington, D. C., March 8, 1922.

My Dear Mr. President: I have the honor to acknowledge your request for my opinion as to whether the appointment of Senator Smoot and Representative Burton to the World War Foreign Debt Commission is invalid under Article I, section 6, of the Constitution.

Were this a case of first impression, I should have serious doubt as to what reply I should make. The language of the Constitution is so broad and comprehensive that it can not be denied that the commissioners in question, in a general sense, hold a "civil office under the authority of the United States," and as this commission was created by the Congress at a time when the two commissioners were Members of that body, the application of the section of the Constitution does present a serious and debatable question.

This department has already expressed an opinion on the subject, for, in an opinion rendered by my predecessor, Attorney General Griggs (Op. Atty. Gen., vol. 22, p. 183), specific reference is made to the fact that Senator Morgan was, with the approval of the Executive, appointed a member of the fur seal arbitration, although, while a Senator, he aided in creating that "civil office."

I have failed to find any judicial interpretation of the section of the Constitution now under consideration, and, in the absence of such finally authoritative interpretation, great weight must be attached to the practical construction put upon the Constitution from the beginning of the Government. In such practical construction a distinction has always been made between special employment on the one hand and offices on the other, and between offices—using that term in a general sense—which serve only a temporary purpose, and those which have duration and permanency. From the very beginning of the Government Members of the Senate and the House have, from time to time, been asked to render services for the Government upon commissions of various kinds, and it has never been decided that such temporary employment for a special purpose and to serve an immediate exigency constituted a "civil office" within the meaning of the constitutional provision above referred to.

The Supreme Court has held in a number of cases (*United States v. Hartwell*, 6 Wall, 385; *United States v. Germaine*, 99 U. S. 508; *Auff-*



mordt v. Hedden, 137 U. S. 310) that the word "office" "expresses the idea of tenure, duration, emolument, and duties." Its duties must be "continuing and permanent, not occasional and temporary." In the last-cited case the office then under consideration had no general functions, nor any employment which had any duration as to time, or which extended over any case further than the power to act on that particular case. It was held by the Supreme Court "that the incumbent did not hold an 'office' within the meaning of Article II, section 2, of the Constitution."

Where, therefore, a position does not have continuancy and permanency and its function is restricted to a single matter, the position seems to be that of an executive agent and not an "office" within the meaning of the Constitution.

Many cases could be cited in other jurisdictions and the views of text writers could also be readily adduced to justify the theory that the idea of an office "clearly embraces the idea of tenure, duration, fees, or emoluments, rights, and powers, as well as that of duty."

Applying this distinction between an "office" and a temporary trust to the act of Congress which created the World War Foreign Debt Commission, I would say that for several reasons it excludes the application of the word "office" as above defined.

The commissioners receive no compensation.

Their tenure of office is limited in time and is restricted to a single object.

The subject matter of their duties is work in which the Congress has a peculiar interest and as to which it is finally responsible; for if the adjustment of the debts due to the United States by foreign nations shall ultimately be accomplished by treaty, the latter must receive the sanction of the Senate, and therefore there is propriety in a Member of that body participating in the negotiations. So far as the adjustment of the debt does not depend upon treaty obligations, the question as to what adjustment will be made of it is for Congress to determine, and it has seen fit to delegate the difficult task of adjustment to the commission, with the approval of the President. This increases the propriety of having a Member of the Senate and of the House participate in such adjustment.

Moreover, the commissioners can take no action except with the approval of the President. Their duties, therefore, are primarily those of negotiators for the terms of such adjustment, and secondarily, as an advisory body to the President of the United States.

Inasmuch as both the legislative and the executive branches of the Government have responsibility in the adjustment of these obligations,



it was desirable that there should be coordination between the two branches of the Government, and presumably this consideration prompted the appointment of a Member of the Senate and a Member of the House to confer with the Secretary of State, the Secretary of the Treasury, and the Secretary of Commerce in reaching some wise conclusion which these representatives of the executive and legislative branches of the Government could recommend to the President, to whom the final decision was delegated by Congress.

In substance and effect, your appointment to the debt commission simply puts into operation that which, without the legislation, might have occurred with entire propriety, viz., a conference between the representatives of Congress charged with the final responsibility of adjusting the debt and Cabinet officers who are charged with the duty of carrying out the wishes of Congress. No one would have questioned the propriety of representatives of the appropriate committee of Congress conferring with the Secretary of the Treasury and the Secretary of State, with a view to some recommendation to be made to the President which would guide him in his duty of negotiating with foreign countries for the adjustment of their financial obligations to this country.

Having in mind the debates in the Constitutional Convention, it seems clear that the purpose of Article I, section 6, was to prevent Members of Congress from creating offices which thereupon they would seek to fill by resigning their positions in Congress. Thus the fundamental idea was the incompatibility of the new offices thus created with their existing office as Members of Congress. This reason is plainly inapplicable to the present legislation, for, when Senator Smoot and Representative Burton act on this debt commission, they are not exercising duties which are incompatible with their duties as Members of Congress, but, on the contrary, their duties as commissioners are, in a sense, an auxiliary to their work as Congressmen, and moreover an auxiliary to all the Members of Congress in any further consideration that that body may feel obliged to give to this matter of adjusting these foreign obligations.

Here, again, it seems unreasonable to interpret the provision of the Constitution in question in a way that would forbid the cooperation between the legislative branch of the Government and the executive, which, with the growing complexity of life, is becoming increasingly necessary.

I can not think that such a statesmanlike solution of the question is within the mischief against which the constitutional provision above

referred to was made. That provision (Art. I, sec. 6) evidently intended, on the one hand, that Congress should not create offices which its Members should fill, and that it should not be within the power of the President, on the other hand, to appoint to office Members of Congress when the offices have been created during their membership. This was a wise and salutary provision; but it seems to me to strain the language to apply it to a mere temporary employment, without compensation, and purely of an advisory capacity and intended to serve a temporary emergency.

To take an extreme illustration, it could hardly be said that if Congress creates a joint commission, to be composed of executive officers and Members of Congress, to take charge of the inauguration of a President, that such temporary and honorable employment offends the inhibition of the Constitution. There must be, in the nature of the case, as our governmental machinery becomes more complex, frequent measures to insure closer cooperation and a better coordination between the Executive and the legislature. It has long since been found impracticable to apply the Montesquieu doctrine as to the separation of the Government into three distinct and independent departments in all its literal force. Coordination must be secured if the machinery of the Constitution is to function, and to do so it must be possible, where temporary emergencies require it, to enable members of the executive and legislative departments of the Government to cooperate for special purposes on special commissions, and to construe the constitutional inhibition as obstructing and preventing such reasonable coordination tends to make the section of the Constitution in question impracticable of enforcement.

An impracticable and unreasonable construction of any clause of the Constitution ought to be avoided, and, as no judicial authority can be cited which forbids the views herein expressed, and as the practical construction by the Government from its very beginning and long acquiesced in has given some sanction to the views above expressed, I have less hesitation in advising you that in my judgment the appointment of Senator Smoot and Representative Burton does not offend Article I, section 6, of the Constitution.

H. M. DAUGHERTY,  
*Attorney General.*

The President,  
*The White House, Washington, D. C.*

## b. Report of Judiciary Committee

[Senate Report No. 563, 67 Cong., 2 Sess.; in *Congressional Record*, vol. 62, pp. 5257-5260.]

MR. WALSH of Montana, from the Committee on the Judiciary, submitted the following report to accompany Senate Resolution 244:

The Committee on the Judiciary, to which was submitted by Senate Resolution 244 the question of the eligibility of Hon. Reed Smoot and Hon. Theodore E. Burton to membership on the commission created under the act of Congress approved February 9, 1922, in view of the fact that at the time of the passage of the act the former was, as he still is, a Member of the Senate and the latter was, and he still is, a Member of the House of Representatives, respectfully reports that, having referred the question so submitted to a subcommittee, consisting of Senators Cummins, Brandegee, Sterling, Overman, and Walsh, it reported that, having investigated the question, the conclusion was reached that the gentlemen named are ineligible, Senators Cummins and Sterling dissenting; that upon the incoming of the said report your committee canvassed the question and now reports that it is its opinion the gentlemen mentioned are not, nor is either of them, eligible to membership on the said commission for which they have been nominated by the President of the United States.

In its labors the committee had the assistance of a discussion of the question presented by Senator Walsh, copy of which is hereto appended, supporting the view that the gentlemen named are not eligible, and in support of the contrary view discussion by Senators Cummins and Nelson and an opinion by the Attorney General which, it is understood, will be made a part of a report to be submitted by the minority of the committee.

In the opinion of the Attorney General reference is made to an earlier opinion of his department, copy of which, with some comments thereon by Senator Walsh, is attached hereto.

T. J. Walsh.  
Frank B. Brandegee.  
G. W. Norris.  
Lee S. Overman.  
Henry F. Ashurst.

Wm. E. Borah.  
C. A. Culberson.  
Jas. A. Reed.  
Jno. K. Shields.

. . . . .

In what has been said in a casual way on the subject since the discussion was precipitated in connection with the legislation for funding the

foreign debt, reference has been made to the frequency with which Members of Congress have been appointed as commissioners to draft treaties, a practice which, though denounced from time to time by able statesmen, dates from the early days of the Republic and was recently followed by President Harding in naming Senators Lodge and Underwood on the American delegation to the Washington Conference on Disarmament. But no justification can be found in these precedents for the appointment under consideration. The positions so filled were not created by any law of Congress. The Constitution reposes in the President of the United States, the power and authority to negotiate treaties. He may act in person, as President Wilson did at Versailles, or he may designate some one to act for him, pursuing the course usually followed. It is not necessary that the appointment of persons so designated should be confirmed by the Senate. Out of abundance of caution, and perhaps from a considerate regard for the sensibilities of Senators, such appointments were, in our early history, with some frequency submitted to the Senate, and that course has been occasionally followed in modern times, but **it can** scarcely be contended longer that it is essential that it be.

Another class of cases, quite similar in character, includes appointments on commissions to settle international disputes, like boundary commissions or other arbitration commissions, the members of which are appointed pursuant not to an act of Congress but to a treaty. Such officers, if they may be so denominated, do not come under the operation of the clause of the Constitution under consideration which was intended to exclude Members of Congress only from such offices as they had as such a part in creating or in making more desirable by increasing the emoluments attached to it. The provision in question was one of the compromises of which not a few are found in the Constitution. The more skeptical wished to make Members ineligible to appointment to any office, and not only for the term of the Member but as well for a year after its expiration. Others objected to any restriction on the appointing power in that regard. It was finally agreed that the safety of the Republic would be sufficiently assured if the temptation were removed only with respect to such offices as the Members respectively participated in creating or making more inviting in the manner indicated. So, admitting that the members of commissions such as those last referred to are officers and that they act under the authority of the United States, rather than under a joint authority of our country and the other party to the treaty, the offices they hold are not of that class the makers of the Constitution had in mind when they framed the clause in question; that is, though they may be within its letter, they are not within its spirit.

A third class of commissions to which Members of Congress have frequently been appointed are, such as are authorized and empowered to investigate and report to Congress for its information, as a basis for legislation, which it may or may not subsequently enact. An act creating such a commission gave rise to an investigation by the Judiciary Committees of both Houses of the whole subject now being considered, action having been taken in the Senate on the motion of Senator Hoar, of Massachusetts, the chairman of its Committee on the Judiciary. Under the act involved, President McKinley appointed as members of a commission to propose legislation for the government of the Hawaiian Islands, among others, Senators Cullom and Morgan and Representative Hitt. The House committee, through its chairman, Hon. David B. Henderson, once Speaker, made an elaborate report, copy of which is appended hereto, in which the eligibility of Members of Congress to appointment on such a commission was upheld. The Senate committee made no report, but the views of the committee in disapprobation of the practice of appointing Members of Congress to such positions were conveyed to the President by the distinguished lawyer who was then chairman of the committee, and the Senate declined to confirm the nominations of the gentlemen named against whom no objection was made except that they were Members of Congress. We are, accordingly, without any direct determination either by the Senate or its Committee on the Judiciary on the question here discussed.

Later, however, the general subject was again canvassed in the Senate in connection with a bill for the creation of a commission to investigate and report to Congress, which the Senate amended so that the appointment of Members of Congress to membership on it was forbidden.

Speaking to the amendment referred to, Senator Hoar detailed the proceedings had in connection with the Hawaiian bill, as herein recited, denounced the policy of appointing Members of Congress on such commissions, asserted that the well-nigh unanimous opinion of the Senate was against it, and that he and many other Senators were convinced that it was in contravention of the Constitution. A copy of his remarks on that occasion are appended hereto.

The position taken by Speaker Henderson, which, bear in mind, was not accepted by Senator Hoar, was that inasmuch as the commission considered by him could recommend only and had no power either to make a law, to execute a law, or to construe a law, it discharged neither legislative, executive, nor judicial functions; it exercised no part of the sovereign power of government; and therefore its members held no "office," were not "officers."



Congress might, it was pointed out, disregard utterly any report or recommendation such a commission might submit and either omit or refuse to do anything on the subject to which it relates, or it might, in the usual way, initiate legislation of a wholly different character from that recommended. It might even anticipate the report of the committee and take action in the premises entirely at variance with any views entertained by the members of the commission.

The principle announced in the report of Speaker Henderson is believed by some members of the committee to lead to the conclusion that the members of the Foreign Debt Funding Commission hold no "office" within the meaning of the term as it is applied in section 6 of Article I of the Constitution. It is said, in support of that view, that the commission has no powers, because whatever arrangement it may make with any foreign Government is subject to the approval of the President; that in consequence of that provision the authority to make the composition [*sic*] is vested in the President and that the commission merely gathers information for his enlightenment, makes recommendations to him, upon which he is to make the final and binding agreement. But that contention is plainly at war with the perfectly clear language of the act. By its terms it is to the commission, not to the President, that the authority is given to conduct the negotiations and to enter into the agreements. He has what may be denominated with substantial accuracy a veto power, and a veto power only. If their work should be unsatisfactory to him he has no power, under the act, to initiate new negotiations or to conduct them. He might undoubtedly, under the authority to make treaties conferred upon him by the Constitution, undertake the task, but whatever agreements he might make so acting would not be final, as is provided in the act, but would be subject to ratification by the Senate. But in the event supposed he would be powerless, so far as the funding act is concerned. The fact that what the commission does is subject to the approval of the President can not be said to be inconsistent with the idea that they exercise a part of the sovereign power of the Government, or, in other words, hold office. . . . The places for which Senator Smoot and Representative Burton have been nominated are offices within the meaning of section 6 of Article I, and they are ineligible thereto.

[Then follow several appendices, and a minority report signed by seven members of the Committee.]

## 75. REAPPORTIONMENT

The Constitution requires Congress to make an apportionment of Representatives every ten years, but after the census of 1920 Congress failed to perform this duty



for that decade. One reason for the delay was the difficulty of agreeing upon the size of the House, a problem all the more acute with the shifting of population from the rural to the urban centers. As either a reduction in size or retention at the present figure (435) <sup>1</sup> would mean the loss of seats by some states, especially those of a rural character, the members from those states were naturally hesitant to accept reapportionment on that basis. On the other hand, should there be no reduction in the representation of any state, the House would be increased to what is commonly considered an unwieldy size (483 on the basis of the 1920 census, 537 on the basis of the 1930 census <sup>2</sup>). In order to avoid the constant recurrence of these problems, Congress in 1929 provided a system of automatic reapportionment (which had also been provided in 1850), which no longer requires the enactment of a new law following each census and under which the reapportionment of 1930 was actually made. It should also be clear that reapportionment, to be effective and to represent fairly the different interests and sections of a state, requires state as well as congressional action. This is illustrated by the situation in Illinois, where the congressional districts drawn in 1901 were unchanged for decades, an act of the Illinois legislature of 1931 having been declared unconstitutional as gross gerrymandering and no other act having yet (1940) been passed.

#### a. Apportionment Act of 1911

[U. S. Statutes, vol. 37, pp. 13-14.]

An Act for the Apportionment of Representatives in Congress among the several States under the Thirteenth Census.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That after the third day of March, nineteen hundred and thirteen, the House of Representatives shall be composed of four hundred and thirty-three Members,<sup>3</sup> to be apportioned among the several States as follows: [Here follows the actual apportionment.] . . .

SEC. 3. That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative.

SEC. 4. That in case of an increase in the number of Representatives in any State under this apportionment such additional Representative or

<sup>1</sup> The House had been increased by every previous reapportionment except that of 1842, when it was reduced by 10.

<sup>2</sup> See tables prepared by the Census Bureau, in *Congressional Record*, vol. 74, pt. 3, pp. 2625-2627 (Jan. 19, 1931).

<sup>3</sup> Increased to 435 by the admission in 1912 of Arizona and New Mexico with one member each.

Representatives shall be elected by the State at large and the other Representatives by the Districts now prescribed by law until such State shall be redistricted in the manner provided by the laws thereof and in accordance with the rules enumerated in section three of this Act; and if there be no change in the number of Representatives from a State, the Representatives thereof shall be elected from the districts now prescribed by law until such State shall be redistricted as herein prescribed.

SEC. 5. That candidates for Representative or Representatives to be elected at large in any State shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

Approved, August 8, 1911.

### b. Apportionment Act of 1929

[U. S. Statutes, vol. 46, pp. 21, 26-27.]

CHAP. 28.—An Act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of Representatives in Congress.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. . . .*

SEC. 22. (a) On the first day, or within one week thereafter, of the second regular session of the 71st Congress and of each 5th Congress thereafter,<sup>4</sup> the President shall transmit to the Congress a statement showing the whole number of persons in each State, excluding Indians not taxed, as ascertained under the 15th and each subsequent decennial census of the population, and the number of Representatives to which each State would be entitled under an apportionment of the then existing number of Representatives made in each of the following manners:

(1) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method used in the last preceding apportionment, no State to receive less than one member;

(2) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known

<sup>4</sup> The adoption of the 20th (Lame Duck) Amendment in 1933, changing the date for the sessions of Congress, made this Act impossible of further operation; but Congress, in April, 1940, restored its automatic character by requiring the President's statement to be transmitted to the *first* regular session of the appropriate Congress, instead of the second.

as the method of major fractions, no State to receive less than one member; and

(3) By apportioning the then existing number of Representatives among the several States according to the respective numbers of the several States as ascertained under such census, by the method known as the method of equal proportions, no State to receive less than one member.

(b) If the Congress to which the statement required by subdivision (a) of this section is transmitted, fails to enact a law apportioning representatives among the several States, then each State shall be entitled, in the second succeeding Congress and in each Congress thereafter until the taking effect of a reapportionment under this act or subsequent statute, to the number of representatives shown in the statement based upon the method used in the last preceding apportionment.

It shall be the duty of the clerk of the last House of Representatives forthwith to send to the executive of each State a certificate of the number of representatives to which such state is entitled under this section. In case of a vacancy in the office of clerk, or of his absence or inability to discharge this duty, then such duty shall devolve upon the officer who, under section 32 or 33 of the revised statutes, is charged with the preparation of the roll of representatives-elect.

(c) This section shall have no force and effect in respect of the apportionment to be made under any decennial census unless the statement required by subdivision (a) of this section in respect of such census is transmitted to the Congress within the time prescribed in subdivision (a).

Approved, June 18, 1929.

### c. Apportionment of 1930

[*Congressional Record*, vol. 74, pp. 246-247 (Dec. 5, 1930).]

#### STATEMENT WITH REFERENCE TO APPORTIONMENT UNDER THE FIFTEENTH DECENNIAL CENSUS OF POPULATION

The SPEAKER laid before the House a further message from the President, which was read, and, together with the accompanying papers, referred to the Committee on the Census and ordered printed.

*To the Congress of the United States:*

In compliance with the provisions of section 22 (a) of the act approved June 18, 1929, I transmit herewith a statement prepared by the Bureau of the Census, Department of Commerce, giving the whole number of persons in each State, exclusive of Indians not taxed, as ascertained under the Fifteenth Decennial Census of Population, and the number of Representatives to which each State would be entitled under

an apportionment of the existing number of Representatives by the method known as the method of major fractions, which was the method used in the last preceding apportionment, and also by the method known as the method of equal proportions.

HERBERT HOOVER.

THE WHITE HOUSE, *December 4, 1930.*

Mr. STAFFORD. Mr. Speaker, I ask unanimous consent that the statement be printed in the RECORD. It refers to the apportionment, and I think all Members will be interested in seeing it in the RECORD.

The SPEAKER. Is there objection to the request of the gentleman from Wisconsin?

There was no objection.

The statement is as follows:

*Apportionment of 435 Representatives by the method of major fractions, which was used in the last preceding apportionment, and by the method of equal proportions, with total population of the several States, number of Indians not taxed, and population basis of apportionment*

State	Population as enumerated Apr. 1, 1930	Indians not taxed	Population basis of apportion- ment	Apportionment of 435 Representatives by method of—	
				Major fractions used in last preceding apportion- ment	Equal propor- tions
Total .....	122,288,177	194,722	122,093,455	435	435
Alabama .....	2,646,248	6	2,646,242	9	9
Arizona .....	435,573	46,198	389,375	1	1
Arkansas .....	1,854,482	38	1,854,444	7	7
California .....	5,677,251	9,010	5,668,241	20	20
Colorado .....	1,035,791	942	1,034,849	4	4
Connecticut .....	1,606,903	6	1,606,897	6	6
Delaware .....	238,380	.....	238,380	1	1
Florida .....	1,468,211	20	1,468,191	5	5
Georgia .....	2,908,506	60	2,908,446	10	10
Idaho .....	445,032	3,496	441,536	2	2
Illinois .....	7,630,654	266	7,630,388	27	27
Indiana .....	3,238,503	23	3,238,480	12	12
Iowa .....	2,470,939	519	2,470,420	9	9
Kansas .....	1,880,999	1,501	1,879,498	7	7
Kentucky .....	2,614,589	14	2,614,575	9	9
Louisiana .....	2,101,593	.....	2,101,593	8	8
Maine .....	797,423	5	797,418	3	3
Maryland .....	1,631,526	4	1,631,522	6	6
Massachusetts .....	4,249,614	16	4,249,598	15	15
Michigan .....	4,842,325	273	4,842,052	17	17
Minnesota .....	2,563,953	12,370	2,551,583	9	9
Mississippi .....	2,009,821	1,667	2,008,154	7	7

State	Population as enumerated Apr. 1, 1930	Indians not taxed	Population basis of apportionment	Apportionment of 435 Representatives by method of—	
				Major fractions used in last preceding apportionment	Equal proportions
Missouri.....	3,629,367	257	3,629,110	13	13
Montana.....	537,606	12,877	524,729	2	2
Nebraska.....	1,377,963	2,840	1,375,123	5	5
Nevada.....	91,058	4,668	86,390	1	1
New Hampshire....	465,293	1	465,292	2	2
New Jersey.....	4,041,334	15	4,041,319	14	14
New Mexico.....	423,317	27,335	395,982	1	1
New York.....	12,588,066	99	12,587,967	45	45
North Carolina....	3,170,276	3,002	3,167,274	11	11
North Dakota.....	680,845	7,505	673,340	2	2
Ohio.....	6,646,697	64	6,646,633	24	24
Oklahoma.....	2,396,040	13,818	2,382,222	9	9
Oregon.....	953,786	3,407	950,379	3	3
Pennsylvania.....	9,631,350	51	9,631,299	34	34
Rhode Island.....	687,497	.....	687,497	2	2
South Carolina....	1,738,765	5	1,738,760	6	6
South Dakota.....	692,849	19,844	673,005	2	2
Tennessee.....	2,616,556	59	2,616,497	9	9
Texas.....	5,824,715	114	5,824,601	21	21
Utah.....	507,847	2,106	505,741	2	2
Vermont.....	359,611	.....	359,611	1	1
Virginia.....	2,421,851	22	2,421,829	9	9
Washington.....	1,563,396	10,973	1,552,423	6	6
West Virginia.....	1,729,205	6	1,729,199	6	6
Wisconsin.....	2,939,006	7,285	2,931,721	10	10
Wyoming.....	225,565	1,935	223,630	1	1

#### d. Illinois Redistricting Case

[*Moran v. Bowley* (1932), 347 Ill. 148-171; 179 N. E. 526-535.]

Mr. Justice Jones delivered the opinion of the court:

This is an appeal from a decree entered by the circuit court of Boone county declaring an act of the General Assembly, sometimes known as the Congressional Apportionment act of 1931, to be unconstitutional and void and enjoining the expenditure of public funds in carrying out its provisions.

The bill of complaint was filed by Frank T. Moran and G. E. Casper against William Bowley, county clerk of Boone county and William J. Stratton, Secretary of State of Illinois. The complainants represented themselves to be citizens, residents, tax-payers and legal voters of Boone county. The bill was twice amended and in its final form alleged

that the Fifty-seventh General Assembly of this State passed the act above referred to, entitled "An act to apportion the State of Illinois into twenty-seven congressional districts, to provide for the election of representatives therein and to repeal an act therein named;" that it was approved by the Governor on July 2, 1931, and that the act purported to divide the State into districts numbered from 1 to 27, inclusive, each district having a population as here indicated:<sup>5</sup> 1, 269,989; 2, 329,759; 3, 311,814; 4, 232,261; 5, 541,785; 6, 273,679; 7, 311,021; 8, 285,891; 9, 309,785; 10, 205,074; 11, 322,319; 12, 308,516; 13, 285,499; 14, 211,948; 15, 343,293; 16, 199,104; 17, 158,738; 18, 272,505; 19, 268,656; 20, 229,384; 21, 261,408; 22, 213,154; 23, 276,521; 24, 301,605; 25, 280,854; 26, 227,827; 27, 308,365. The bill as amended alleges that under certain acts of Congress hereafter referred to [i.e., Acts of 1911 and 1929], it was the duty of the legislature of the State to divide the State into twenty-seven districts of contiguous and compact territory, containing, as nearly as practicable, an equal number of inhabitants; that the districts created by the act of the General Assembly are unreasonably unequal in population, as before indicated, and in many instances are not composed of contiguous and compact territory, notwithstanding it was reasonably possible and convenient to have made the districts conform to the requirements of the acts of Congress and the Constitution of the State of Illinois. . . .

The Apportionment Act of 1929 was passed pursuant to the provisions of section 2 of article 1 and section 2 of article 14 [14th Amendment], and the Districting act of 1911 was passed pursuant to the provisions of section 4 of article 1 of the constitution of the United States. There is no conflict between the acts, and there is no reason to be advanced why both cannot remain in full force and effect. In view of the history of the times and the mischief which had been wrought [by the failure of Congress to reapportion following the 1920 census], as well as the plain language of the enactments themselves, we hold that the act of 1929 was not intended to, and did not, repeal the act of 1911. Both acts are essential to the time-honored policies and history of the Federal government, and, inasmuch as the legislature in remapping a State for congressional purposes must be governed by the laws of Congress as they are contained in those acts, it is necessary that their provisions be substantially complied with. Reference to the population of districts heretofore set out will disclose a marked disparity of population among

<sup>5</sup> For population of the 25 congressional districts provided in 1901 which this case left in effect, see "Reapportionment in Illinois: Congressional and State Senatorial Districts," *Illinois Legislative Council: Research Report No. 3* (Aug., 1938), p. 4.



the twenty-seven districts. If the population of the State be divided by 27 the ratio of population for each district is substantially 280,000, yet the population in the several districts varies from 158,738 in the seventeenth district to 541,785 in the fifth district. Such a redistricting gives a voter in the seventeenth district three and four-tenths times as much weight in electing a congressman as a voter has in the fifth district. Twenty-two out of the twenty-seven districts have fifty per cent more population than the seventeenth district, fourteen districts have seventy-five per cent more population than the seventeenth district and four have over one hundred per cent more than the seventeenth district. The fifth district is in Cook county. It has approximately one hundred per cent more population than any one of four other districts in the same county. The fifteenth district, with a population of 343,293, adjoins the sixteenth district, with a population of only 199,104. The seventeenth district, with a population of 158,738, adjoins both districts. The fifteenth district is composed of nine counties, while the sixteenth district is composed of six counties and the seventeenth district of five counties. There is no apparent reason why so many counties should have been included in the fifteenth district when some of them could have been attached to either the sixteenth or seventeenth district and thereby answer the requirements of the constitution as to those districts. As it is, the fifteenth district contains 144,189 more persons than the sixteenth district and 184,555 more persons than the seventeenth district. The power of one voter in the sixteenth or seventeenth district in an election of a congressman is double that of a voter in the fifteenth district. The population of the fourteenth district is about 70,000 less than the ratio. The population of the second district is about 50,000 greater than the ratio. . . .

We have no hesitancy in saying that the act of 1911 is in full force and effect so far as it relates to the formation of congressional districts.<sup>6</sup> Still, even if it should be held that the act was repealed by the act of 1929, the Re-districting act of Illinois cannot be sustained. If there were no congressional enactments upon the subject the legislature is powerless to pass laws which effectually tend to disfranchise large numbers of voters. Section 18 of article 2 of the constitution of this State provides that all elections shall be free and equal. An election is free when the voters are exposed to no intimidation or improper influence

<sup>6</sup> This part of the decision was reversed by the United States Supreme Court, which held, in cases arising out of Missouri and Kentucky, that the provisions of the Act of 1911 relating to compact and contiguous territory and to equality of population were no longer in force. *Wood v. Broom* (1932), 287 U. S. 1; 77 L. Ed. 131; and *Mahan v. Hume* (1932), 287 U. S. 575; 77 L. Ed. 505.

and when each voter is allowed to cast his ballot as his own conscience dictates. (*People v. Hoffman*, 116 Ill. 587; *People v. Emmerson*, 333 id. 606.) Elections are equal when the vote of each voter is equal in its influence upon the result to the vote of every other elector—when each ballot is as effective as every other ballot. *People v. Emmerson*, *supra*; *People v. Election Comrs.* [sic], 221 Ill. 9.

The people of Illinois have by their constitution of 1870 reserved to themselves the ultimate sovereignty to be exercised by means of the ballot. To protect and preserve that sovereignty they declared that all elections shall be free and equal, to the end that each voter will have the privilege of casting his ballot without duress or constraint, and that his vote shall be substantially equal in its influence to that of every other qualified voter. The legislature is not permitted to flagrantly violate this section of the bill of rights and bestow upon classes or sections of voters a greater power and influence in elections than upon other like groups, and, as was said in *Sherman v. People*, 210 Ill. 552, the proper and honest conduct of elections is one of the most important functions of government, and the legislature certainly is charged with the duty of enacting such laws as will accomplish this end. Members of the House of Representatives should be chosen by a method giving every voter a voice approximately equal to that of every other voter. Any plan of redistricting which is not based upon approximate equality of inhabitants will work inequality in right of suffrage and of power in elections of the representatives in Congress. The Re-districting act of 1931 is not only obnoxious to the laws of Congress but to the constitution of this State. . . .

We find no error in the proceedings, and the decree of the Chancellor is affirmed.

*Decree affirmed.*

[Chief Justice Stone and Justice DeYoung dissented.]

## 76. INSTRUCTION OF MEMBERS OF CONGRESS

There has always been considerable discussion and difference of opinion over the function of a representative in democratic government. Edmund Burke argued that a representative is chosen by the people to think and act for them, and that, once chosen, he is a free and independent agent. Others hold that a representative is chosen merely as a convenient mouthpiece of the people, and that he is therefore always subject to their will, so far as that can be determined. The latter view has probably had the widest acceptance in the United States, and it was not unusual for a state legislature, before the change to popular election, to instruct the Senators (and occasionally even the Representatives) from that state how to vote on particular measures. Such instructions may also be given expressly or impliedly in

party platforms and otherwise, although in every case the difficulty of assuring respect for such instructions is obvious.

#### a. View of Senate, 1791

[*Journal of William Maclay* (ed. 1927, published by A. & C. Boni), pp. 387-388.]

*February 24th, Thursday.*—This day nothing of moment engaged the Senate in the way of debate until the Virginia Senators moved a resolution that the doors of the Senate chamber should be opened on the first day of the next session, etc. They mentioned their instructions. This brought the subject of instructions from the different Legislatures into view.

Elsworth said they amounted to no more than a wish, and ought to be no further regarded. Izard said no Legislature had any right to instruct at all, any more than the electors had a right to instruct the President of the United States. Mr. Morris followed; said Senators owed their existence to the Constitution; the Legislatures were only the machines to choose them; and was more violently opposed to instruction than any of them. We were Senators of the United States, and had nothing to do with one State more than another. Mr. Morris spoke with more violence than usual.

Perhaps I may be considered as imprudent, but I thought I would be wanting in the duty I owed the public if I sat silent and heard such doctrines without bearing my testimony against them. I declared I knew but two lines of conduct for legislators to move in—the one absolute volition, the other responsibility. The first was tyranny, the other inseparable from the idea of representation. Were we chosen with dictatorial powers, or were we sent forward as servants of the public, to do their business? The latter, clearly, in my opinion. The first question, then, which presented itself was, were my constituents here, what would they do? The answer, if known, was the rule of the Representatives. Our governments were avowedly republican. The question now before us had no respect to what was the best kind of government; but this I considered as genuine republicanism.

#### b. Instructions of New York Legislature, 1836

[*Laws of New York, 59th Session, 1836*, pp. 810-811.]

STATE OF NEW-YORK.

*In Assembly, January 26, 1836.*

Whereas the senate of the United States did, on the 28th day of March, 1834, adopt a resolution in these words, viz :

*Resolved*, That the president in the late executive proceedings, in relation to the public revenue, has assumed upon himself authority and power not conferred by the constitution and laws, but in derogation of both." And whereas such act is regarded by the legislature of the state of New-York as an assumption of power, on the part of the said senate, and a usurpation of the constitutional powers of the house of representatives, calculated to subvert the fundamental principles of our government: Therefore,

*Resolved*, (if the senate concur,) That the senators of this state in congress be, and they are hereby instructed to use their best efforts to procure the passage of a resolution directing the aforesaid resolution to be expunged from the journal of the senate of the United States, in the manner indicated by a resolution pending in the house of delegates of the state of Virginia, on the 4th day of January, instant, to wit: "by causing black lines to be drawn around the resolution in the original manuscript journal, and these words plainly written across the face of the said resolution and entry: 'Expunged by order of the senate of the United States,' or in such other manner as may be best calculated to attain the object intended."

*Resolved*, That this legislature regard the right of instruction as founded upon the very basis of representation, and as the natural result of the connexion between constituent and representative, and also that the representative is bound to obey the instructions of his constituents or to resign the power with which they have entrusted him.

*Resolved*, That the governor of this state be requested to transmit a copy of the foregoing resolutions to each of the senators and representatives in congress from this state, and that the said senators be requested to lay them before the senate of the United States.

By order,

CHARLES HUMPHREY, *Speaker*.

P. Reynolds, Jr. *Clerk*.

STATE OF NEW-YORK.

*In Senate, February 3, 1836.*

*Resolved*, That the senate do concur with the assembly in the said resolutions.

By order,

JOHN TRACY, *President*.

John F. Bacon, *Clerk*.

**c. Instructions of Democratic Party of South Carolina, 1926**

[Resolution of Democratic State Convention, held at Columbia, S. C., May 19, 1926. Text in *Congressional Record*, vol. 67, p. 9844.]

**RESOLUTION 1**

Whereas Hon. Cole L. Blease, United States Senator, has introduced in Congress a bill to regulate the employment of certain persons by the United States Government, which reads as follows:

*"Be it enacted, etc.,* That from and after the passage of this act no person not a citizen of the United States shall be employed by any official of the United States Government in any of its departments in any capacity whatsoever: *Provided,* That any person not a citizen of the United States, who has duly made and filed his or her application for citizenship in the United States pending the decision on such application, will be eligible for temporary employment; but if such application is denied, or the person so employed does not become a naturalized citizen within the time provided by law, such employment must cease.

*"SEC. 2.* Any violation of this act by any official of the United States Government shall be punished by immediate dismissal from office."

Whereas we believe that such legislation is badly needed and will work for the best interests of the people of the United States, and that same will, if enacted into law, bring about a better feeling and understanding among the laboring people of this country, and will serve as an inducement to aliens within our borders to become naturalized citizens, and being appreciative of his efforts in this direction and of his 100 per cent Americanism: Now, therefore, be it

*Resolved,* That the Democratic Party of South Carolina, in State convention assembled, go on record as indorsing said bill, and requests all of South Carolina's Representatives in Congress to support the same.

By Hon. Ben. E. Adams, of the Charleston delegation.

## CHAPTER XIII

### CONGRESS: WORKING METHODS AND PROCEDURE

#### 77. PARTY CAUCUS

Among the most important institutions affecting the working of Congress is the party caucus. Although not provided for by constitution, statute, or rule of either house, the caucus is probably the dominant factor in the organization of each house and in the determination of legislative policy. The methods of organizing and controlling the caucus, and the character of its functioning, are therefore of the greatest importance.

##### a. Democratic House Caucus Rules

[Furnished through the courtesy of Representative John W. Garrett, of Tennessee.]

##### PREAMBLE

In adopting the following rules for the Democratic Caucus, we affirm and declare that the following cardinal principles should control Democratic action:

- a. In essentials of Democratic principles and doctrine, unity.
- b. In nonessentials, and in all things not involving fidelity to party principles, entire individual independence.
- c. Party alignment only upon matters of party faith or party policy.
- d. Friendly conference and, whenever reasonably possible, party co-operation.

##### DEMOCRATIC CAUCUS RULES

1. All Democratic Members of the House of Representatives shall be *prima facie* members of the Democratic Caucus.
2. Any member of the Democratic Caucus of the House of Representatives failing to abide by the rules governing the same shall thereby automatically cease to be a member of the Caucus.
3. Meetings of the Democratic Caucus may be called by the Chairman upon his own motion and shall be called by him whenever requested in writing by twenty-five members of the Caucus or at the request of the Party Leader.



4. A quorum of the Caucus shall consist of a majority of the Democratic Members of the House.

5. General parliamentary law, with such special rules as may be adopted, shall govern the meetings of the Caucus.

6. In the election of officers and in the nomination of candidates for office in the House, a majority of those present and voting shall bind the membership of the Caucus.

7. In deciding upon action in the House involving party policy or principle, a two-thirds vote of those present and voting at a Caucus meeting shall bind all members of the Caucus: *Provided*, The said two-thirds vote is a majority of the full Democratic membership of the House: *And provided further*, That no member shall be bound upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolutions or platform from his nominating authority.

8. Whenever any member of the Caucus shall determine, by reason of either of the exceptions provided for in the above paragraph, not to be bound by the action of the Caucus on those questions, it shall be his duty, if present, so to advise the Caucus before the adjournment of the meeting, or if not present at the meeting, to promptly notify the Democratic leader in writing, so that the party may be advised before the matter comes to issue upon the floor of the House.

9. That the five-minute rule that governs the House of Representatives shall govern debate in the Democratic Caucus, unless suspended by a vote of the Caucus.

10. No persons, except Democratic Members of the House of Representatives, a Caucus Journal Clerk, and other necessary employees, shall be admitted to the meetings of the Caucus.

11. The Caucus shall keep a journal of its proceedings, which shall be published after each meeting, and the yeas and nays on any question shall, at the desire of one-fifth of those present, be entered on the journal.

#### b. Proceedings of Democratic House Caucus

[N. Y. Times. Feb. 14, 1924.]

House Democrats in a caucus ending early tonight [Feb. 13] pledged themselves to stand solidly back of the Garner plan, including the 44 per cent. surtax maximum in the tax reduction debate which will begin tomorrow.

Of the 168 Democrats present at the meeting, only two, Representative Hawes of Missouri and Representative Deal of Virginia, favored the Mellon bill. After deliberation the caucus bound Mr. Hawes to abide by the majority decision and to vote for the Garner rates, but excused Mr. Deal on the ground that he had promised his constituents before election that he would vote for the Mellon plan.

Seven other Democrats asked to be excused from voting for the Garner maximum on the basis that they had told their constituents they would not vote to reduce surtaxes lower than at present. The caucus recognized these promises given to supporters, and released them from the party obligation. The result will be that they will vote first for the Frear surtax maximum, and when that is defeated, as it probably will be, they will support the Garner figure.

The seven men were said to be Representatives Rankin of Mississippi, Wolff of Missouri, Hill of Washington, Cannon of Missouri, Wilson of Mississippi, Underwood of Ohio and Taylor of West Virginia. . . .

Under the caucus agreement tonight, all Democrats in the House were bound to vote for the surtax and normal rates and individual exemptions in the Garner plan, except the few men who were excused. Under the rules of the Democratic caucus, a two-thirds majority may bind all the members of the party in the House, so the 168 men present this afternoon were many more than were necessary out of the full representation of 207.

It was said after the caucus that while Representative Hawes stood for the 25 per cent. surtax rates, it was found impossible to allow him to cast his vote for it, because he did not come within the caucus exception which says no member shall be found "upon questions involving a construction of the Constitution of the United States or upon which he made contrary pledges to his constituents prior to his election or received contrary instructions by resolution or platform from his nominating authority." Any of the thirty-nine Democrats who were absent from the caucus will be excused from conforming to the majority stand on the tax question if they can show they have qualified under the exceptions stated.

An interesting sidelight of the Democratic caucus was that Representative Wefald, the Farmer-Labor Representative from Minnesota, sat in it as an interested spectator. He said later he was given to understand his presence was not wanted at the recent Republican conference on taxes, but that the Democrats had welcomed him today.

**c. Proceedings of Republican House Caucus**

[*N. Y. Times*, Feb. 28, 1925.]

Nicholas Longworth of Ohio, the majority floor leader, was nominated for Speaker of the House in the next Congress by a vote of 140 to 84 over Martin B. Madden of Illinois, Chairman of the Appropriations Committee, at a caucus tonight [Feb. 27] of the Republicans of the next House. Representative John Q. Tilson of Connecticut was unanimously named to succeed Mr. Longworth as floor leader.

These nominations were made in less than an hour and a half. The action is equivalent to their election, for the Republicans of the next House will out-number the Democrats by sixty-two.

According to an arrangement between Representatives Begg of Ohio and Britten of Illinois, respectively Longworth and Madden campaign managers, the nomination was carried through with dispatch. In five-minute speeches Representative Burton of Ohio named Mr. Longworth and Representative Cole of Iowa seconded the nomination, while Representative Chindblom of Illinois nominated Mr. Madden and Representative Newton of Minnesota made the seconding speech.

The result settled a bitter fight which had been going on practically ever since Congress convened last December and which had become intensive during the last week. Up to the actual opening both sides were claiming victory, Mr. Begg saying he had 135 votes for Mr. Longworth, and Mr. Britten insisting that Mr. Madden would be nominated on the first ballot by more than 121 votes.

After the roll call showed that Mr. Longworth had won, Mr. Madden moved to make the vote unanimous. Mr. Longworth immediately walked over to Mr. Madden and shook his hand.

Mr. Longworth also addressed the caucus, saying he appreciated its action, not only because of the honor carried by the Speakership, but because of the confidence shown in him by his party associates in naming him for that high office. . . .

Representative Hawley was Chairman of the caucus and Representative Sweet was chosen Secretary. Representative Butler of Pennsylvania was absent, but was elected Vice Chairman. Representative Vare asked that Mr. Butler be recorded as voting for Mr. Madden for Speaker and this was agreed to.

Republican membership in the new House will total 245, but only about 225 were present at the caucus. Many men elected last Novem-

ber and who are not in the present House came to Washington for the meeting.

The caucus decided that the Committee on Committees, composed of one man from the Republican delegation of each State, should go ahead, whenever it pleased, to name members for committee assignments, and it was also settled, according to precedent, that each member of the committee should be authorized to cast votes equal to the number of Republicans in his State delegation.

Great curiosity had been felt as to the probable action of the ten Wisconsin Radicals, and Representatives Keller of Minnesota, LaGuardia of New York and Sinclair of North Dakota, whom the regular Republicans had decided to exclude from the caucus on the ground that they had worked against the party's nominees, Coolidge and Dawes, in the campaign of last year. Mr. Sinclair had announced that he would demand admission to the caucus and would remain there until rejected. None of the Radicals, however, attended the caucus tonight. . . .

The caucus renominated the present regular officers of the House, including William Tyler Page to be the clerk.

Just before the caucus adjourned the question of punishing the insurgents in connection with committee assignments was brought up. Mr. Britten made a plea for Representative Lampert of Wisconsin and Mr. Newton of Minnesota defended Mr. Keller of Minnesota.

Representative Snell of New York, Chairman of the Rules Committee, offered a motion that no member who had not supported the Presidential nominee in the last election should have a place on committees. No vote was taken and the whole subject was referred to the Committee on Committees, which will meet on March 5 to make the committee assignments.

## 78. REVOLUTION OF 1910-11

For a considerable number of years prior to 1910, the House proceedings had been dominated by the Speaker. Besides the usual powers of a presiding officer, the Speaker had in his own hands the appointment of all standing committees and was himself the controlling member of the Committee on Rules. Through these means he had become the most powerful force in legislation, and was usually considered second in importance only to the President. The growing resentment of members against the vigorous use of these powers was reflected in the characterization of Speaker Thomas B. Reed as "Czar" Reed, and of the speakership of Joseph G. Cannon as "Cannonism." This resentment culminated in 1910 in an alliance between the Democratic minority and about forty "insurgent" Republicans, who revolted against the system that had been established, forced the adoption of more liberal rules, and stripped the Speaker of some of his power.

**a. Norris Resolution**

[Offered by Mr. Norris (Neb.; Rep.), and adopted Mar. 19, 1910, by vote of 191-156. *Congressional Record*, vol. 45, pt. 4, pp. 3429, 3436.]

*Resolved*, That the rules of the House of Representatives be amended as follows:

"1. In Rule X, paragraph 1, strike out the words 'on Rules, to consist of five members.'

"2. Add new paragraph to Rule X, as follows:

"'Paragraph 5. There shall be a Committee on Rules, elected by the House, consisting of 10 Members, 6 of whom shall be Members of the majority party and 4 of whom shall be Members of the minority party. The Speaker shall not be a member of the committee and the committee shall elect its own chairman from its own members.'

*Resolved further*, That within ten days after the adoption of this resolution there shall be an election of this committee, and immediately upon its election the present Committee on Rules shall be dissolved.

**b. House Debate**

[*Congressional Record*, vol. 45, pt. 4, pp. 3430, 3436-3437 (Mar. 19, 1910).]

MR. CLARK of Missouri. Mr. Speaker, no man in this presence realizes more thoroughly than I do the seriousness as well as the importance of this occasion. I want to make one personal remark; whether it will be popular or not I do not know, and to tell you the truth I do not care. This is not a personal fight, so far as I am concerned, or ever has been, against the Hon. Joseph G. Cannon, from the State of Illinois, personally. [Loud applause on both sides of the Chamber.] I can lay my hand on my heart and truthfully assert that the personal relations between that distinguished personage and myself have always been pleasant.

So far as I am concerned and as far as the men who have cooperated with me are concerned, so far as I know, this is a fight against a system. We think it is a bad system, as far as this Committee on Rules has been concerned. It does not make any difference to me that it is sanctified by time. There never has been any progress in this world except to overthrow precedents and take new positions. [Applause.] There never will be. Reformers and progressives are necessarily and inevitably iconoclasts.

I want to say another thing, so far as I am concerned. There is no other proposition pending in my mind on my own initiative or by agreement with anybody except the one that is pending here today. I have

believed ever since I was in the House long enough to understand the work of the Committee on Rules that the fact that the Speaker of the House was chairman of that committee, and practically the Committee on Rules, gives the Speaker of this House more power than any one man ought to have over the destinies of this Republic. [Applause on the Democratic side.]

Macaulay says that Sir Robert Walpole was avaricious of power. I am not certain but that the illustrious historian might without exaggeration have extended that remark so as to include the entire human race within its scope. It is for that very reason that restrictions, constitutional and otherwise, are placed upon public men—even upon hereditary kings, emperors, and potentates. And every such new restriction smashes precedents. We had made up our mind months ago to try to work the particular revolution that we are working here to-day, because, not to mince words, it is a revolution. I have no fear of revolutions, for men of our blood revolutionize in the right direction. The enlargement of the Committee on Rules even in itself has some beneficent features attached to it, simply that and nothing more, because it takes into consideration, as the gentleman from Wisconsin [Mr. Cooper] stated the other night, the larger portion of the country. But I am not giving my adhesion to any proposition concerning this rules business that does not remove the Speaker now, and, so far as we can control it, for all time to come, from the Committee on Rules. [Applause on the Democratic side.] That is my position, and in that I speak for the Democrats of the House and the insurgent Republicans. [Applause on the Democratic side.] We are fighting to rehabilitate the House of Representatives and to restore it to its ancient place of honor and prestige in our system of government.

I do not believe that men in this world are heard for much speaking or that much attention is paid to it after it is done, and it seems to me that I have stated our whole contention.

You can not restore to the membership of this House the quantum of power that each Member is entitled to without taking from the Speaker of the House some quantum of the power he now enjoys, because he practically enjoys it all. On this proposition I could wish that there could be a unanimous vote of this House, but that is a hope too fantastic for entertainment. We want to try this experiment. If it does not work well, Mr. Speaker, the House at any time can change it, because it has now been definitely settled that this House can do what it pleases when it wants to do it. [Applause on the Democratic side.]

. . . . .



THE SPEAKER. Gentlemen of the House of Representatives: Actions, not words, determine the conduct and the sincerity of men in the affairs of life. This is a government by the people acting through the representatives of a majority of the people. Results can not be had except by a majority, and in the House of Representatives a majority, being responsible, should have full power and should exercise that power; otherwise the majority is inefficient and does not perform its function. The office of the minority is to put the majority on its good behavior, advocating, in good faith, the policies which it professes, ever ready to take advantage of the mistakes of the majority party, and appeal to the country for its vindication.

From time to time heretofore the majority has become the minority, as in the present case, and from time to time hereafter the majority will become the minority. The country believes that the Republican party has a majority of 44 in the House of Representatives at this time; yet such is not the case.

The present Speaker of the House has, to the best of his ability and judgment, cooperated with the Republican party, and so far in the history of this Congress the Republican party in the House has been enabled by a very small majority, when the test came, to legislate in conformity with the policies and the platform of the Republican party. Such action of course begot criticism—which the Speaker does not deprecate—on the part of the minority party.

The Speaker can not be unmindful of the fact, as evidenced by three previous elections to the Speakership, that in the past he has enjoyed the confidence of the Republican party of the country and of the Republican Members of the House; but the assault upon the Speaker of the House by the minority, supplemented by the efforts of the so-called insurgents, shows that the Democratic minority, aided by a number of so-called insurgents, constituting 15 per cent of the majority party in the House, is now in the majority, and that the Speaker of the House is not in harmony with the actual majority of the House, as evidenced by the vote just taken.

There are two courses open for the Speaker to pursue—one is to resign and permit the new combination of Democrats and insurgents to choose a Speaker in harmony with its aims and purposes. The other is for that combination to declare a vacancy in the office of Speaker and proceed to the election of a new Speaker. After consideration, at this stage of the session of the House, with much of important legislation pending involving the pledges of the Republican platform and their crystallization into law, believing that his resignation might consume

weeks of time in the reorganization of the House, the Speaker, being in harmony with Republican policies and desirous of carrying them out, declines by his own motion to precipitate a contest upon the House in the election of a new Speaker, a contest that might greatly endanger the final passage of all legislation necessary to redeem Republican pledges and fulfill Republican promises. This is one reason why the Speaker does not resign at once; and another reason is this: In the judgment of the present Speaker, a resignation is in and of itself a confession of weakness or mistake or an apology for past actions. The Speaker is not conscious of having done any political wrong. [Loud applause on the Republican side.] The same rules are in force in this House that have been in force for two decades. The Speaker has construed the rules as he found them and as they have been construed by previous Speakers from Thomas B. Reed's incumbency down to the present time.

Heretofore the Speakers have been members of the Committee on Rules, covering a period of sixty years, and the present Speaker has neither sought new power nor has he unjustly used that already conferred upon him.

There has been much talk on the part of the minority and the insurgents of the "czarism" of the Speaker, culminating in the action taken to-day. The real truth is that there is no coherent Republican majority in the House of Representatives. [Loud applause on the Republican side.] Therefore, the real majority ought to have the courage of its convictions [applause on the Republican side], and logically meet the situation that confronts it.

The Speaker does now believe, and always has believed, that this is a government through parties, and that parties can act only through majorities. The Speaker has always believed in and bowed to the will of the majority in convention, in caucus, and in the legislative hall, and to-day profoundly believes that to act otherwise is to disorganize parties, is to prevent coherent action in any legislative body, is to make impossible the reflection of the wishes of the people in statutes and in laws.

The Speaker has always said that, under the Constitution, it is a question of the highest privilege for an actual majority of the House at any time to choose a new Speaker, and again notifies the House that the Speaker will at this moment, or at any other time while he remains Speaker, entertain, in conformity with the highest constitutional privilege, a motion by any Member to vacate the office of the Speakership and choose a new Speaker [loud applause on the Republican side]; and, under existing conditions, would welcome such action upon the part of the actual majority of the House, so that power and responsibility may

rest with the Democratic and insurgent Members who, by the last vote, evidently constitute a majority of this House. The Chair is now ready to entertain such motion. [Loud and long-continued applause on the Republican side; great confusion in the Hall.]

[A resolution to declare the office of Speaker vacant was promptly offered, but was rejected by a vote of 155-192. On April 5, 1911, new rules were adopted, depriving the Speaker also of his power to appoint the standing committees and providing instead for their election by the House.]

## 79. SELECTION OF COMMITTEES

The standing committees of the Senate have, practically since the beginning, been elected by the Senate itself, and those of the House have also been similarly elected since the so-called "revolution of 1910-11." However, the above statement sets forth only the formal process of selection. The actual assignments of members to committees are now made in each house by the Committee on Committees, chosen by the party caucus, and guided primarily by party considerations.

### a. Senate Rules with respect to Selection of Committees

[*Senate Manual, 1936*, (S. Doc. No. 258, 74th Cong., 2d Sess.), p. 29.]

## RULE XXIV

### APPOINTMENT OF COMMITTEES

1. In the appointment of the standing committees, the Senate, unless otherwise ordered, shall proceed by ballot to appoint severally the chairman of each committee, and then, by one ballot, the other members necessary to complete the same. A majority of the whole number of votes given shall be necessary to the choice of a chairman of a standing committee, but a plurality of votes shall elect the other members thereof. All other committees shall be appointed by ballot, unless otherwise ordered, and a plurality of votes shall appoint.

2. When a chairman of a committee shall resign or cease to serve on a committee, and the Presiding Officer be authorized by the Senate to fill the vacancy in such committee, unless specially otherwise ordered, it shall be only to fill up the number on the committee.

**b. House Rules with respect to Selection of Committees**

[*House Manual and Digest, 1937* (H. Doc. No. 496, 74th Cong., 2d Sess.), pp. 303-307.]

**RULE X****OF COMMITTEES**

1. There shall be elected by the House, at the commencement of each Congress, the following standing committees. . . . [Here follows an enumeration of these committees.]

2. The Speaker shall appoint all select and conference committees which shall be ordered by the House from time to time.

3. At the commencement of each Congress the House shall elect as chairman of each standing committee one of the members thereof; in the temporary absence of the chairman the member next in rank in the order named in the election of the committee, and so on, as often as the case shall happen, shall act as chairman; and in case of a permanent vacancy in the chairmanship of any such committee the House shall elect another chairman.

4. All vacancies in standing committees of the House shall be filled by election by the House.

. . . . .

**c. Party Methods in Selection of Committees**

[News Item in *N. Y. Times*, Mar. 6, 1925.]

The Sixty-ninth Congress began to function in part today [Mar. 5] when the Senate met in special session for the transaction of "executive" business, by proclamation of President Coolidge. Prior to its meeting there was a caucus of Republican Senators, at which Senator Moses was chosen by acclamation for President pro tempore of the Senate in place of Senator Cummins of Iowa, who declined to accept re-election to that important office after six years' service.

Subsequently the Republican Committee on Committees of the Senate and House held separate sessions in which they got down to the work of recasting the personnel of committees. In doing so they showed an inclination to conform to President Coolidge's desires, although nothing came to light to indicate that the President was making any effort to influence them. Tomorrow there will be a caucus of Senate Republicans to confirm what the Committee on Committees arranged today.

Formal notice to the insurgents of the House that they would not be recognized as Republicans came this afternoon, when the Committee on Committees not only left Representative Frear of Wisconsin off the Ways and Means Committee, but passed a resolution declaring that no one would be recognized as a Republican who did not support the Coolidge-Dawes ticket in the last campaign.

Acting under this resolution, the Committee on Committees will refuse to include the ten Wisconsin radicals and Representatives Keller of Minnesota, LaGuardia of New York and Sinclair of North Dakota as belonging to the majority, but will assign them to committee memberships as if they belonged to an independent party. This will place them in a class by themselves, as the Senate Committee on Committees arranged to do with nominal Republican Senators who deserted the party last year. Although elected to the new Congress as a Socialist, Mr. LaGuardia still claims that he is entitled to Republican affiliations.

In addition to displacing Senators LaFollette of Wisconsin, Brookhart of Iowa and Ladd and Frazier of North Dakota, from the senior positions which their Republican classification gave them on committees, the Senate Committee on Committees made assignments of new Republican Senators and shifted around some others. The most interesting shift concerned Senator Wadsworth of New York and Senator Butler of Massachusetts. Mr. Wadsworth will remain as Chairman of the Committee on Military Affairs, but he will be transferred from the Committee on Foreign Relations to the Committee on Finance.

The shift was in accordance with Mr. Wadsworth's wish. Senator Butler, however, was credited with not finding satisfaction in his transfer from the Judiciary Committee to the Foreign Relations Committee, but in giving him membership in the latter body in place of Senator Wadsworth President Coolidge's effort for American adhesion to the World Court is considerably strengthened.

Senator Butler wanted a place on the Finance Committee. It was indicated today that there was a disinclination to put him there because he is a large manufacturer and there might be criticism of including him in the committee which handles tariff and taxation measures and other legislation having to do with financial and business affairs.

Mr. Butler, who managed President Coolidge's pre-convention and election campaign, still is Chairman of the Republican National Committee. He is a close personal as well as political friend of Mr. Coolidge and generally regarded as the President's personal representative in the Senate. Another Senator regarded in the same light is Frederick H. Gillett, Mr. Butler's Massachusetts colleague, who became a Senator

yesterday within an hour after he had ceased to be Speaker of the House. Mr. Gillett was anxious to get the place on the Foreign Relations Committee which Senator Butler accepted rather reluctantly.

Senator Gillett felt that he was entitled to have the committee assignment he most cherished. His contention was that a man who had served in the House of Representatives for thirty-two years and had been its Speaker should not be treated as a new and untried Senator. He asked for the Committee on Foreign Affairs, and was understood to have said that he wanted that assignment and that alone. The Committee on Committees, however, determined that Mr. Gillett should go to the Judiciary Committee for his most important committee assignment, taking the place left vacant by the transfer of Mr. Butler to the Foreign Relations Committee. Senator Gillett's other assignments were to the Committees on Education and Labor and on Enrolled Bills.

Senator Watson of Indiana, Chairman of the Committee on Committees, was slated to be Chairman of the Committee on Interstate Commerce, which handles legislation relating to the railroads. He will displace Senator Smith of South Carolina, a Democrat, who was elected Chairman by a combination of Democrats and LaFollette Republicans in the Congress which died yesterday. Senator LaFollette was the senior Republican member of this committee, and its Chairmanship would have gone to him under the seniority rule if he had not set up his Third Party last year with the purpose of defeating President Coolidge.

As things were arranged today, Mr. LaFollette, with Messrs. Brookhart, Ladd and Frazier, will be put at the end of committee lists, along with the sole Farmer-Laborite, Mr. Shipstead of Minnesota. They will be junior in each case to the lowest ranking Democratic member. Mr. LaFollette will lose the Chairmanship of the Committee on Manufactures and will take the place of Magnus Johnson, Farmer-Laborite of Minnesota, who passed out of the Senate yesterday. That is, he and his associates will have these lowly committee places if they care to take them. It may be that they will refuse to serve on any committee.

Another Republican radical who supported LaFollette's Presidential aspirations last year will also lose a Chairmanship—Senator Ladd, who was Chairman of the Committee on Public Lands and Surveys in the last Congress. That committee achieved much prominence through the fact that it conducted the investigation into the naval oil leases. Senator Stanfield of Oregon will become Chairman in his place.

Of the new Republican Senators who began their services yesterday Messrs. Goff of West Virginia, Sackett of Kentucky and Pine of Oklahoma will be assigned to the Committee on Interstate Commerce.



No announcement of the assignments made by the Republican Committee on Committees was made today. The list will be laid before the Republican caucus tomorrow and, if approved, will be made public.

Senator Norris of Nebraska, who has shown an independence of the Republican Party and was cold to the Coolidge-Dawes ticket last year, will be allowed to retain the Chairmanship of the Committee on Agriculture.

The transfer of Senator Butler to Senator Wadsworth's place on the Foreign Relations Committee bears on the World Court recommendation of President Coolidge. Mr. Wadsworth, while friendly to the President's policies, voted against the Harding-Hughes plan of American adhesion to the court which Mr. Coolidge has endorsed, and in favor of the so-called Pepper plan, which is regarded as designed to make American participation in the World Court under Senator Pepper's conditions unacceptable to the league. Senator Butler is for the President's plan. . . .

The resolution passed by the Republican Committee on Committees of the House read:

"It is voted that in the selection of the committees we recognize as Republicans only those who supported the Republican national ticket and platform in the last campaign."

Only one of the House insurgents was affected by the selections made today. Representative Frear, of Wisconsin, was left off the Ways and Means Committee. Consideration of what places the other twelve radicals will occupy did not come up, for the reason that the only Republican Committee memberships picked were for the Committees on Appropriations and Interstate Commerce, and no radicals were on these committees. Assignment of memberships on other committees was deferred until just before the next meeting of the House, probably in December.

For the Ways and Means Committee Representatives Bixler of Pennsylvania, Faust of Missouri, and Aldrich of Rhode Island, were chosen to succeed Messrs. Frear, Young of North Dakota, who resigned from Congress last year, and Tilson, who leaves the committee by virtue of his new post as floor leader. In the last Congress this committee was composed of twenty-six men, but the Republican organization decided today to limit it to twenty-five, divided between fifteen Republicans and ten Democrats, instead of fifteen Republicans and eleven Democrats.

On the Appropriations Committee Representatives Clague of Minnesota, and Simmons, of Nebraska, were designated to succeed Messrs. Davis, of Minnesota, who was defeated, and Anderson, of the same State, who did not stand for re-election. The size of the committee was left at twenty-one Republicans and fourteen Democrats, so that it could

be divided into seven sub-committees of three Republicans and two Democrats each.

Many names of candidates were submitted for membership on the Interstate Commerce Committee, but Representatives Fredericks of California, Robinson of Iowa, Phillips of Pennsylvania, and Garber of Oklahoma, were picked to serve.

The Committee on Committees decided to increase the Interstate Commerce Committee from 21 to 23. The Democrats were allowed to retain their nine men, but the Republicans added two to its membership.

A tentative decision was reached to make the ratio of major committees 13 to 8, instead of 12 to 9, this change being based on the increased Republican membership of the House.

Representatives Green of Iowa, and Madden of Illinois, were renamed as Chairmen, respectively, of the Ways and Means Committee and Appropriations Committee, and Representative Parker of New York was designated to take the place of ex-Representative Winslow of Massachusetts, who was Chairman of the Interstate Commerce Commission [Committee].

While there seems to be no question that the insurgents will be set down as independents, the actual disposition of them was left to a sub-committee headed by Representative Tilson. This sub-committee will make all Republican selections for committees other than those named today, and will submit them just before the convening of Congress.

## 80. CONFERENCE COMMITTEE

In case the two houses fail to agree on a bill, the measure is then submitted to a committee representing both houses, which attempts to smooth out the points in disagreement. If agreement is reached by this committee, an identical report is made to each house under rules that prevent amendment but permit only acceptance or rejection of the report as a whole. Since in practice the houses are compelled to resort to conference on practically all important legislation, the importance of the conference committee as a legislative organ can hardly be over-emphasized.

### a. Composition of Conference Committee

[*Congressional Record*, vol. 66, pt. 3, pp. 2552-2553, 2555, 2557, 2561 (Jan. 28, 1925).]

The PRESIDING OFFICER laid before the Senate the action of the House of Representatives disagreeing to the amendments of the Senate to the bill (H. R. 518) to authorize and direct the Secretary of War, for national defense in time of war and for the production of fertilizers and

other useful products in time of peace, to sell to Henry Ford, or a corporation to be incorporated by him, nitrate plant No. 1, at Sheffield, Ala.; nitrate plant No. 2, at Muscle Shoals, Ala.; Waco Quarry, near Russellville, Ala.; steam power plant to be located and constructed at or near Lock and Dam No. 17, on the Black Warrior River, Ala., with right of way and transmission line to nitrate plant No. 2, Muscle Shoals, Ala.; and to lease to Henry Ford, or a corporation to be incorporated by him, Dam No. 2 and Dam No. 3 (as designated in H. Doc. No. 1262, 64th Cong., 1st Sess.), including power stations when constructed as provided herein, and for other purposes, and requesting a conference with the Senate on the disagreeing votes of the two Houses thereon.

MR. UNDERWOOD. I move that the Senate insist on its amendments and agree to the conference asked by the House.

The motion was agreed to.

MR. UNDERWOOD. Now, I want to explain the motion that I intend to make. It is rather unusual. I did not include in my previous motion that the Chair appoint the conferees on the part of the Senate. I think in a case of this kind the conferees should reflect the sentiment of the Senate in regard to the bill. In fact, on page 205 of the Senate Manual, in discussing the question, this statement is made:

"Of course, the majority party and the prevailing opinion have the majority of the managers."

Unfortunately the senior members of the committee are not in favor of the bill or the view of the Senate as the bill passed, and as the rules of the Senate authorize or require the election of conferees, except by unanimous consent, and desiring to have conferees to reflect the viewpoint of the Senate with reference to the bill, without in any way intending to reflect on the other members of the committee who have expressed their own views, and solely with the purpose of having Senate conferees respond to the House and see if they can work out a conclusion satisfactory to both Houses, I move that the Senator from New Hampshire [Mr. Keyes], the Senator from Illinois [Mr. McKinley], and the Senator from Mississippi [Mr. Harrison] be appointed the conferees, on the part of the Senate.

MR. SMOOT. Mr. President, I will say to the Senator that that is rather an unusual move.

MR. UNDERWOOD. I have just said so.

MR. SMOOT. What the Senator has said is correct, but it is always understood in the Senate that when the Senate appoints conferees the conferees shall take the judgment expressed by the majority vote in this body. They are to stand for the Senate amendments or, if it is a Senate

bill, they are to stand against the House amendments to the bill. It seems to me that it is going outside the usual course, as the Senator admits, to make a motion to appoint conferees rather than to follow the general custom.

MR. UNDERWOOD. I will say to the Senator that of course my motion is strictly within the rule. It is a rule of the Senate. The custom of the Senate, of course, has been that the proposer of a bill or the chairman of a committee, when it comes to the point where a conference is asked, shall move that the Senate insist on its amendments, agree to a conference, and that the Chair appoint the conferees on the part of the Senate, and the Chair usually says, "Without objection, it is so ordered"; otherwise the Senate would always elect conferees.

It happens in this case that there is a very distinct line of determination in regard to the bill. One side is in favor of a Government corporation operating the plant. There is no dispute about that at all. That side is represented by the chairman of the Committee on Agriculture and Forestry, who very sincerely and earnestly represents that particular view and has not yielded a particle on it. Knowing him as I do, I know full well that he will not yield, because he is earnest and sincere and is going to stand for what he believes. His position is that we should have Government operation of the plant. . . .

The bill that I introduced, and which is in accord with the message of the President of the United States, is primarily in favor of leasing the property if a lessee can be obtained. It does provide that if a lease can not be made then there shall be Government operation, and that is solely because this is a national defense plant and must be operated by the Government if it can not be operated by an individual. But the real line of demarkation is that Senators on the other side of the question, as represented by the chairman of the Committee on Agriculture and Forestry, believe primarily that it should be operated by the Government. They have been perfectly sincere in their argument and they have made that argument to the last moment that the question was before the Senate. I do not doubt their sincerity at all.

The position I take is that it is the part of wisdom to attempt to get a lessee to operate the plant on a contract made by the President, and that was the viewpoint expressed by the last vote of the Senate, which was 50 to 30. The House has asked for a conference and I think it is no reflection whatever on Senators who view it the other way that the Senate should send to the conference conferees who believe in the idea of operating the plant under lease rather than under Government ownership and operation as a primary object,

Of course, this is not the final vote. The conferees will meet and if they reach a conclusion they must bring it back to the Senate. When it comes back the Senate will then have an opportunity to express its view as to whether it agrees to the report of the conferees. But according to the rules and the precedents, I think we are entitled to conferees who reflect the last vote of the Senate in passing the bill. That is all I am asking, that they go to the conference reflecting the viewpoint of the Senate. . . .

MR. SIMMONS. It is our rule, heretofore observed, so far as I know, to appoint as conferees the ranking members of the majority and ranking member of the minority. What I desire to say is that the Senate ought in the first instance to rely upon the good faith of those gentlemen, without any regard to their attitude when the matter was before the Senate, to carry out in conference the will of the Senate as expressed in its ultimate action. I know of no precedent against that; but we came very near establishing such a precedent at the last session of Congress, when the situation was, I think, identical with the situation which the Senator now presents to the Senate.

In the consideration of the revenue bill passed during the last session the majority members of the Senate—all of them, I think, except one—had opposed very strenuously the ultimate action of the Senate as to certain very important and vital phases of that bill, just as in the case before the Senate to-day.

The chairman of the committee and some of the other members of the committee, who under the ordinary practice of the Senate would have been entitled to appointment as conferees, strenuously opposed the action which was finally taken by the Senate. The contention of the minority having been adopted by the Senate in the revenue bill, I was concerned then, as ranking member of the minority, as the Senator from Alabama now is concerned, about what might be the attitude of the chairman of the committee, the distinguished Senator from Utah [Mr. Smoot], and his two associates who would have been entitled under the rules to appointment as conferees with him. I was concerned with the course they might pursue in the conference, because of their strenuous opposition to the action of the Senate; and I considered, together with my colleagues on this side and those on the other side who had acted with us in the incorporation into the bill of these provisions that were so much opposed by the majority on the other side, as to what course we should pursue; whether or not we should do exactly what the Senator proposes to do now, and make a demand that the Senate in the first instance name the



conferees, and name only such conferees as were favorable to the bill in the form in which it passed the Senate.

Mr. President, in those conditions we seriously took into consideration the fact that the majority of the conferees who under our rules would be appointed might probably be opposed to the action of the Senate in the conference as they had been upon the floor of the Senate. We finally resolved that by deciding it to be good policy, as well as in the interest of harmony in the Senate, that we should not by our action express distrust of the sincerity and good faith of those gentlemen, but that we should assume, as a matter of course, that they would discharge their obligation to the Senate, and in conference, whatever might have been their attitude when the measure was pending in the Senate, would stand by the final action of the Senate upon those vital matters. . . .

MR. NORRIS. . . . Now, I want to discuss this proposition as it is related to the custom of the Senate. I knew that if the custom of the Senate prevailed I would be appointed to head the conferees on the part of the Senate on this bill. I was somewhat surprised when I discovered that there was quite a movement on foot to prevent my being appointed. If I had been appointed and had served, I would have done just what the Senator from North Carolina has said another Senator did against whose appointment there was opposition. I would have represented the Senate and would have done all I could honorably to have the action of the Senate prevail in the conference. I would not accept a place on a conference committee with any other idea. But, as I have said, I had determined, even before any suggestions had been made, that I would not accept appointment on the conference committee, because, to my mind, I would almost have to stultify myself. I did not believe in the bill; I had no faith in the action taken by the Senate; I was sincerely bitterly opposed to it, and it seemed to me that I should eliminate myself and ought to stay off the committee.

I would not have accepted appointment on the committee under any other condition than the understanding that I represented not myself, but the Senate, and I would have felt it my duty to back up the action of the Senate, just as an attorney must look after the interests of his client; and if he can not do it, he should not take the case. He has a right in the beginning to refuse to be retained. I had the right to refuse to be appointed, and would exercise it. . . .

Personally, I do not believe in that custom of the Senate. I think the fundamental proposition that those friendly to legislation should be appointed on conference committees is correct. I do not believe I ought to be on the conference committee. . . .



MR. MCKELLAR. I offer the following motion: I move, as a substitute for the motion of the Senator from Alabama [Mr. Underwood], that, in accordance with the usual custom of the Senate, the Chair be requested to appoint as conferees on the part of the Senate on H. R. 518 the chairman of the Committee on Agriculture and Forestry [Mr. Norris] and Mr. McNary, the next Republican on the committee, and Mr. Smith, of South Carolina, the ranking Democrat on the committee.

. . .

MR. UNDERWOOD. On the substitute of the Senator from Tennessee, I demand the yeas and nays.

The yeas and nays were ordered. . . .

The result was announced—yeas 35, nays 33. . . .

So Mr. McKellar's motion was agreed to.

#### **b. Power of Conference Committee**

[*Congressional Record*, vol. 62, pt. 12, pp. 12806-12808 (Sept. 18, 1922).]

MR. SIMMONS. . . . It was generally known when the [tariff] bill was in the making that the organized and special interests whose influence dominated and controlled the formulation of its policy naturally expected some rebuffs and upsets both in the House and Senate, but that they confidently relied upon the committee of conference on the disagreeing votes of the two Houses to correct such errors, so regarded from their standpoint, by nullifying, overruling, and setting aside any action regarded by them as prejudicial to their interests and plans. It was and is known that the rules governing conference reports of both Houses, especially of the Senate, powerfully lend themselves to such a consummation, particularly in the case of tariff bills dealing with hundreds and even thousands of different items.

The record of the conference report on the bill is a startling verification of the confidence of the special interests whose plans had in part been thwarted by the two Houses, and impressively uncovers and discloses the dangers to the integrity of popular legislation which lurk in the conference system as now interpreted and applied. The arbitrary and usurpatory course of the conferees, their disregard, not to say contempt, of the known will of the two Houses, and their apparent subserviency to the will of the special interests, can best be illustrated by their action with respect to three or four outstanding matters of vital importance in the bill. With respect to two of those outstanding matters, namely, potash and the dyestuffs embargo, the House has already acted, and in that action administered to the conferees a severe and cut-

ting rebuke. I refer to those two matters now only as instances showing the disposition of the conferees toward the House on the one hand and the special interests on the other hand. . . .

Why, Mr. President, do these designing interests rely more upon the conference committee's action than they do upon the action of either House? First, the body is smaller. Second, they know perfectly well, and the conferees know, that however obnoxious their action with reference to a specific matter may be, where the bill relates, as a tariff bill does, not only to that particular thing but to hundreds and thousands of other things of more or less importance, whatever their action may be with respect to the particular item that action must be accepted by the two Houses, or their whole action upon all the items must be rejected, for a conference report is not subject to amendment on the floor. It is the reliance, I say, of the special interests upon these facts and it is the significance of these facts, leading to these abuses of power, to this disregard of the expressed will of the two Houses, to this trampling under foot of the action of one or the other of the Houses by the conferees—and frequently by the conferees of the very House that acted—that have become a thing of such great danger in our system of legislation and that ought in some way or other to be remedied.

Mr. President, I do not wish to indulge in any lengthy discussion of the embargo. There the same thing happened in conference in an even more obnoxious form than happened in the case of potash, and probably more than in the case of potash it accentuates the point I have made, namely, that of the advantage given to the special interests, and of the impunity with which the public interests may be disregarded with respect to the specific thing involved.

There was an attempt to continue the dyestuffs embargo. It was written in the House bill as it came from the Committee on Ways and Means. It was strenuously advocated and championed by the Ways and Means Committee upon the floor of the House. One member of the Ways and Means Committee of the House has become recognized throughout the country as the special champion of the principle of embargo as applied to dyestuffs. His activities have been so pronounced and so conspicuous that he stands out and overshadows all the other champions of that measure in the House, just as I think the Senator from Utah [Mr. Smoot] probably overshadows all other champions of a duty upon potash. This House Member's efforts in behalf of this embargo provision of the House bill were strenuous. The debate was full, as debates go in the House, spirited, able, and as a result the House struck the embargo provision out of the bill.

When the bill came over to the Senate the embargo provision was restored in the Committee on Finance, notwithstanding the action of the House. The influence of the dyestuffs lobby was strong enough to dominate and control the action both of the committee of the House and the committee of the Senate. They forced this embargo provision back into the bill in the Senate committee after the House had stricken it out in a very impressive way, almost in a sensational way, and the bill came upon the floor of the Senate, where another battle was waged against it, a hot and spirited battle. Never before in all the history of legislation since I have been here has there been such a powerful lobby around this Capitol as came here in support of the dye-embargo proposition. They swarmed the corridors, they forced themselves into the private offices of Senators, they hung around the doors of the Senate Chamber, they could not be shaken off, they yielded to no rebuff. . . . They prevailed with the Finance Committee; but when the bill came here to the floor, after thorough discussion and deliberation, the Senate followed the course of the House and overruled its committee and struck out the embargo provision by repealing the embargo provision of existing law; and so the bill went to conference, the last resort of the special interest, the tribunal in which it is at so much greater advantage than in the open session of either House, the tribunal upon which it always confidently relies to correct what it regards as the errors of the two Houses and to bring out legislation in accordance with its own plans and wishes.

The conference committee restored these embargo provisions with a time limit. Was not this a clear case of yielding the will of the two Houses, as expressed in as emphatic, impressive, and forceful manner as legislative will possibly can be expressed, and overruling that will of both Houses in order to do what a favored special interest demands shall be done? Such an outrage is, of course, shocking and without excuse. The House acted, however, and promptly disapproved the action of the conferees with reference to dyestuffs and potash and directed its conferees to eliminate them.

Of course, the conferees then corrected both of these things, but only because they were forced to do so. I am now referring to these instances because in the situation upon which I have commented, which is illustrated by these two incidents, there lies serious danger to the integrity of legislation and to the ultimate writing into law of the will of the people with reference to these vital matters.

## 81. FILIBUSTERING

Among the practices in Congress most subject to criticism is that of filibustering, that is, the use by a minority of various parliamentary tactics in such a way as to delay proceedings and prevent action on pending measures. On account of the greater freedom allowed by the Senate rules, filibustering is easily carried on in that body, although it has not been made completely impossible even in the House.

## a. Round-Robin Statement relative to Armed Merchant Ship Bill

[*Congressional Record*, vol. 54, pt. 5, p. 4988.]

United States Senate,  
Washington, D. C., March 3, 1917.

The undersigned United States Senators favor the passage of S. 8322, to authorize the President of the United States to arm American merchant vessels and to protect American citizens in their peaceful pursuits upon the sea. A similar bill has already passed the House of Representatives by a vote of 403 to 13. Under the rules of the Senate allowing debate without limit it now appears to be impossible to obtain a vote prior to noon, March 4, 1917, when the session of Congress expires. We desire this statement entered in the *Record* to establish the fact that the Senate favors the legislation and would pass it if a vote could be had.

[Then follow the signatures of 75 Senators.]

## b. Justification of Filibustering

[*Congressional Record*, vol. 64, pt. 4, pp. 4093-4094 (Feb. 20, 1923).]

MR. WILLIAMS. Mr. President, I do not believe that "filibustering," as it is called, is ever justified except in two classes of cases: One of them the Senator from Alabama illustrated when he filibustered against the so-called antilynching bill, because that was a bill which proposed to make murder in a State a Federal offense punishable by a Federal court. Of course, if we once step out on the pathway of making common crimes within the States punishable entirely in the Federal courts, or chiefly there, or at all, we shall have deprived the States of their very life, which is their police power. Whatever else might have been said and however great the abuses which ought to be corrected—and they are great, and I regret them, especially in so far as they apply to my own section—the remedy was not in placing the police power of the States in the hands of the Federal Government. . . .

Mr. President, that was one instance where a filibuster is justified, because I think as we stand here as ambassadors of the States in a Congress, just as much so as delegates in a European congress, where the powers are met in concert, are ambassadors from their several governments, and it is our duty, therefore, to protect the States' rights of our constituents. It is a mistake to assume that there are no States' rights left. They are rapidly disappearing, but there are some yet remaining. Wherever a great, vital, fundamental constitutional question is presented and a majority is trying to override the organic law of the United States, then, I repeat, a filibuster is justified. That was the case to which the Senator from Alabama referred.

But there is another class of cases, and that is when an accidental and incidental temporary majority in a legislative body tries to forestall the future and defeat the will of the majority of the people as expressed at an election, and as will be expressed by a majority of their recently elected representatives. I dare say there is not a man in this body who will have the hardihood to say that the ship subsidy bill can pass through the next Congress. If there be one who has that amount of hardihood, who is capable of that degree of recklessness of assertion, I should like to hear him now tell me that he thinks I am mistaken about it. Ah, Mr. President, the very reason why this bill is being pushed along to a conclusion at this tail end of an expiring Congress, where the "left overs" hold the balance of power, is because every man, from the President in the White House down to the pages upon the floor of the legislative halls, knows that it can not be passed in the next and recently elected Congress of the United States fresh from the people.

I do not believe in delaying legislation. As the Senator from Alabama said, the legislature "must function"; that is true; but it does not follow that it must function in order to put over things to keep a fair expression of the will of the people, as expressed at the last election, from being functioned. Why do you want to put this bill over at this session? Because if you once get it upon the statute books it can not be repealed so long as the present administration is in power, at any rate, because the law repealing it could be and would be vetoed, as everybody knows, and it would take not a majority but two-thirds of both Houses to override the veto. That is the reason. Let us speak plainly to one another and let us speak honestly and candidly to the country. . . .

In order that it may impress itself upon the country, I again say that this effort to pass this bill at this session is immoral and unethical, because it is an attempt to "put over" legislation that the recently elected and true representatives of the people do not want and to rush it through

before they can begin to function as the Members of either House; and to impress the other point I repeat that, in my opinion, there is not a man within the sound of my voice with the hardihood even to *pretend* to believe, even to assert that he does believe that if this legislation does not pass at this session it will pass the next Congress. . . .

## 82. DEBATE RULES

One of the notable differences between the two houses of Congress is in the attitude towards freedom of debate. In the House, with its large membership, debate is severely restricted by the regular rules, and, in addition, special rules are commonly adopted limiting debate still further on particular measures. In the Senate there was, until 1917, practically complete freedom of debate. The filibuster of that year on the Armed Merchant Ship Bill induced the adoption of a mild form of cloture. In fact, the power of individual Senators is still so great as to require unanimous consent for the transaction of a considerable amount of business.

### a. House Debate Rules

[*House Manual and Digest, 1925* (H. Doc. No. 661, 68 Cong., 2 Sess.), pp. 320-326.]

## RULE XIV

### OF DECORUM AND DEBATE

1. When any Member desires to speak or deliver any matter to the House, he shall rise and respectfully address himself to "Mr. Speaker," and, on being recognized, may address the House from any place on the floor or from the Clerk's desk, and shall confine himself to the question under debate, avoiding personality.

2. When two or more Members rise at once, the Speaker shall name the Member who is first to speak; and no Member shall occupy more than one hour in debate on any question in the House or in committee, except as further provided in this rule.

3. The Member reporting the measure under consideration from a committee may open and close, where general debate has been had thereon; and if it shall extend beyond one day, he shall be entitled to one hour to close, notwithstanding he may have used an hour in opening. . . .

6. No Member shall speak more than once to the same question without leave of the House, unless he be the mover, proposer, or introducer of the matter pending, in which case he shall be permitted to speak in reply, but not until every Member choosing to speak shall have spoken.



**b. Special Rule with respect to Ship Subsidy Bill**

[Offered by Mr. Campbell, Chairman of House Committee on Rules, Nov. 22, 1922, debated for one hour and 20 minutes, and adopted by vote of 200-110. *Congressional Record*, vol. 63, pp. 37, 44.]

*Resolved*, That upon the adoption of this resolution it shall be in order to move that the House resolve itself into the Committee of the Whole House on the state of the Union for the purpose of considering H. R. 12817, a bill to amend and supplement the merchant marine act, 1920, and for other purposes. General debate on said bill shall continue until the Committee of the Whole House on the state of the Union rises on Saturday, November 25, at which time general debate shall terminate. The time for such general debate shall be divided equally between those in favor of and those opposing the bill and shall be controlled by the chairman and the ranking minority member opposed to the bill of the Committee on the Merchant Marine and Fisheries; that on Monday, November 27, the bill shall be taken up for amendment under the five minute rule; that in the consideration of the bill any appropriations made in the bill shall not be subject to a point of order; that the consideration of the bill for amendments shall continue not later than the hour of 4 o'clock postmeridian on November 29, at which hour the committee shall rise and report the bill back to the House with such amendments as may have been agreed upon; whereupon the previous question shall be considered as ordered on the bill and on all amendments thereto to final passage without intervening motion except one motion to recommit.

**c. Senate Cloture Rule**

[*Senate Manual*, 1925, pp. 25-26.]

**RULE XXII****PRECEDENCE OF MOTIONS**

. . . . .

If at any time a motion, signed by sixteen Senators, to bring to a close the debate upon any pending measure is presented to the Senate, the presiding officer shall at once state the motion to the Senate, and one hour after the Senate meets on the following calendar day but one, he shall lay the motion before the Senate and direct that the Secretary call the roll, and, upon the ascertainment that a quorum is present, the presiding officer shall, without debate, submit to the Senate by an aye-and-nay vote the question;

"Is it the sense of the Senate that the debate shall be brought to a close?"

And if that question shall be decided in the affirmative by a two-thirds vote of those voting, then said measure shall be the unfinished business to the exclusion of all other business until disposed of.

Thereafter no Senator shall be entitled to speak in all more than one hour on the pending measure, the amendments thereto, and motions affecting the same, and it shall be the duty of the presiding officer to keep the time of each Senator who speaks. Except by unanimous consent, no amendment shall be in order after the vote to bring the debate to a close, unless the same has been presented and read prior to that time. No dilatory motion, or dilatory amendment, or amendment not germane shall be in order. Points of order, including questions of relevancy, and appeals from the decision of the presiding officer, shall be decided without debate.

#### d. Unanimous Consent Agreement

[*Congressional Record*, vol. 65, pt. 4, pp. 3673-3674 (Mar. 6, 1924).]

THE PRESIDING OFFICER. The morning business is closed.

MR. NORRIS. Mr. President, I ask unanimous consent to take up for consideration Senate Joint Resolution 22, Order of Business No. 174.

If Senators will permit me to say just a word in explanation of it, this is a joint resolution amending the Constitution of the United States, and has the unanimous report of the Judiciary Committee. In effect, it is the same constitutional amendment that the Senate passed at the last Congress. It went to the House, was referred to the proper committee, and came back from that committee with a favorable report. It was then placed on the calendar and lost. The joint resolution provides for fixing the time of beginning and ending of the terms of President, Vice President, and Members of Congress in January instead of the 4th of March.

MR. ROBINSON. Mr. President, may I ask the Senator from Nebraska, a question respecting the joint resolution? Is the joint resolution as reported by the Committee on the Judiciary identical in form with the joint resolution which passed the Senate at the last session?

MR. NORRIS. It is not identical in form. It is the same in substance.

MR. ROBINSON. Can the Senator state the differences?

MR. NORRIS. The difference is in section 3. That was not contained in the former joint resolution. The committee found on investigation of other parts of the Constitution that section 3 of the present amendment was necessary. There is another place in the Constitution which

says that if the election of a President is referred to the House of Representatives on account of the electors not having elected a President, if the election does not take place by the House before the 4th day of March—the words “the fourth day of March” being used in the Constitution—then the Vice President elected by the Senate shall become acting President. The fact that we change the beginning of the term from March to January makes it necessary for us to change that part of the Constitution also, which we have done in section 3. It only carries out the purpose of the original joint resolution.

MR. ROBINSON. I feel justified in asking that the joint resolution go over for the present.

THE PRESIDING OFFICER. Objection is made.

MR. ROBINSON. I do not want to be placed in the attitude of objecting to the consideration of the joint resolution. My recollection is that I supported the joint resolution to which the Senator refers.

MR. NORRIS. The Senator did support it in a very able speech when we had it up before.

MR. ROBINSON. I desire, however, to have an opportunity of examining it. I suggest to the Senator that he withdraw his request for the day.

MR. NORRIS. I will withdraw my request and make this one. Let me see if this will satisfy the Senator from Arkansas and other Senators. I ask unanimous consent that to-morrow immediately after the conclusion of the routine morning we take up this joint resolution.

MR. ROBINSON. I shall be unable to be present to-morrow.

MR. NORRIS. Would Saturday suit the Senator?

MR. ROBINSON. I will ask the Senator to make it a special order for some day early next week.

MR. NORRIS. Then I request that on Monday next, immediately after the completion of the routine morning business—

THE PRESIDING OFFICER. The Chair will inform the Senator from Nebraska that there is a unanimous-consent agreement governing the action of the Senate on Monday.

MR. ROBINSON. The Senator from Nebraska is taking care of that. His proposal is that this special order shall take effect immediately after the disposition of the bill which has already been, in a way, made a special order for that day.

MR. NORRIS. Let me inquire of the Chair whether an agreement has been made that will do away with morning business next Monday?

THE PRESIDING OFFICER. That all depends upon whether the Senate adjourns or recesses on Saturday.

MR. NORRIS. We will try to adjourn. If I should request that immediately upon the conclusion of the routine morning business on Monday we shall take up this joint resolution, that will not interfere with the unfinished business, because we will not take until 2 o'clock to conclude it.

THE PRESIDING OFFICER. The Senator from Nebraska asks unanimous consent that when the Senate concludes its business on Saturday, it take an adjournment until Sunday at noon, and at the conclusion of the memorial services scheduled for Sunday that the Senate adjourn until Monday at 12 o'clock, and that at the conclusion of the routine morning business on Monday the Senate proceed to the consideration of Order of Business 174, Senate Joint Resolution 22, proposing an amendment to the Constitution of the United States fixing the commencement of the terms of President and Vice President and Members of Congress, and fixing the time of the assembling of Congress. Is there objection?

MR. KING. I have no objection to that, but I want to give notice to the Senator that on Monday the bill of the Senator from North Dakota [Mr. Norbeck] will be up for consideration.

MR. NORRIS. Yes; but this proposed agreement applies only to the morning hour. Of course, if we do not get through before the conclusion of the morning hour, nothing will be accomplished; but I feel so confident that the joint resolution will not take any great length of time that I am willing to take that chance. It will not, of course, interfere with the morning business. At 2 o'clock the unfinished business will be laid before the Senate.

MR. KING. I want to state to the Senator that if there should be a disposition to discuss at some length on Monday the bill to which I have just referred some of that discussion might take place during the morning hour.

MR. NORRIS. It is possible, I will concede, that Senators who may think the time is going to be short will avail themselves of the privilege of talking about that bill when this joint resolution is up. Let me change the request.

MR. KING. I suggest making it Tuesday.

MR. NORRIS. I will change the request to Tuesday instead of Monday. Then there certainly will be no objection.

THE PRESIDING OFFICER. The Senator from Nebraska asks unanimous consent that when the Senate concludes its business on Monday next it take an adjournment until Tuesday, and that at the conclusion of the routine morning business on Tuesday the Senate proceed to the consideration of Order of Business 174, Senate Joint Resolution 22. Is

there objection? The Chair hears none, and the unanimous-consent agreement is entered into.

### 83. EXPERT ASSISTANCE

The need for expert assistance to Congress, particularly in supplying pertinent information and in bill drafting, has long been recognized. In 1914 the necessary appropriations were voted and a Legislative Reference Service was organized in the Library of Congress, since made a Division of that Library with considerably improved facilities. In 1919 Congress also provided for a Legislative Drafting Service, later renamed the Legislative Counsel.

#### a. Legislative Reference Service

*[Report of the Librarian of Congress, 1920, pp. 199-209.]*

The Legislative reference service of the Library does not, like many of the executive bureaus of the Government, make investigations in the field at first hand nor does it initiate such investigations. It is a service for Members of the House and of the Senate only. It acts only upon their request. It was established by Congress to assist the Members and committees thereof in securing exact information of various kinds, from the Library of Congress or elsewhere, drawn from documentary sources bearing on legislation. The relation of it to Congress was aptly put by Hon. Swager Sherley at the hearings before the Committee on the Library in 1912, when he said:

"As to the reference bureau, there should be no great difficulty. You simply want here a corps of men sufficiently trained to give to Congress, or to a proper number of Members on request, data touching any particular question . . . by having a small corps of men, whose duties pertain only to the demands of Congress. I think you could create a body that could gather together data—could be not the mind of Congress, but, so to speak, the hands and the eyes and the ears of Congress, because all of us, as our work increases with longer tenure, realize the impossibility of making the investigation that we would like to do before coming to a conclusion. No one desires to have Congress have some other body doing its thinking, but all of us would like to have the data collected that would enable us to arrive at better conclusions."

The language of the appropriation reads as follows:

"Legislative reference: To enable the Librarian of Congress to employ competent persons to gather, classify, and make available in translations, indexes, digests, compilations, and bulletins, and otherwise, data

for or bearing upon legislation, and to render such data serviceable to congress and committees and Members thereof."

It will be noted from the foregoing table of statistics that this service received more than 1,600 inquiries from Members of Congress during the fiscal year ending June 30, 1920, this being the largest number of demands made upon the service in any year since its inauguration, not excepting the war Congress.<sup>1</sup> The bulk of these inquiries grew out of the postwar problems.

[Then follows a list of subjects upon which inquiries were made and information furnished.]

The foregoing lists of inquiries are selected to indicate the variety of questions that are customarily asked. Inquiries relating to the whole field of the legislative activity of Congress could be enumerated.

For example, there were a large number of questions relating to the treaty of peace and the League of Nations; reconstruction, economic and social; statistics of various kinds; agricultural problems; foreign and domestic commerce; transportation and communication, including the railroad question; shipping and shipbuilding; labor and industry; departmental organization; American history; translations; and various other such problems. They involved investigation of State, Federal, and foreign laws; foreign and domestic statistics and documents; foreign and domestic economic and historical literature, etc.

The method of answering inquiries received from Members may be stated in the main as follows:

1. If the information can be found already in print in the form appropriate to the inquiry in a book, article, document, or report, this is sent to him with the place marked. If the document itself is bulky the portion desired by the Member is photostated, the positive being sent to him and the negative kept on file for future reference.

2. If the inquiry involves extracts from various sources the material is selected and typed, the typewritten manuscript furnished the Member and extra copies kept in reserve.

3. If the inquiry involves a digest of legal or other information the digest is made in like manner.

4. Many inquiries involve the compilation of statistical tables in the form suggested by the Member.

5. The inquiry may involve lengthy and laborious research upon a question of economics, history, diplomacy, or law, concerning which there is no printed data that can adequately answer the question in the

<sup>1</sup> Later reports show that these inquiries increased since 1935 at the rate of nearly 1,000 a year, and in 1939 amounted to a total of 6,331.



form desired by the Member. In such cases the investigation is assigned to one or more assistants, who go to the various sources and prepare their reports. These are worked up into an appropriate statement.

6. The inquiry may involve short historical sketches in brief summary form, thus making it unnecessary for the Member to read the more extensive accounts.

In every case in making statements of fact or opinion the Legislative reference service cites the source of information with volume and page in order that any statement thus made may be easily verified. No statements are made upon its own initiative or upon its own authority.

The questions above enumerated are typical of those addressed to the Legislative reference service. Nearly every Member of the Senate and a large proportion of the Members of the House called for information of this character during the past fiscal year.<sup>2</sup> In order to meet this demand there was gradually built up during the past five years a small organization with a specially trained force who had become familiar and were in contact with the vast collections of the Library of Congress, now numbering nearly three million pieces. They knew how to use the indexes, catalogues, and other scientific apparatus for the purpose of gaining the desired information with the least effort and in the shortest time and to present it in systematic and available form. The persons employed in this work—especially in the higher grades—must have a comprehensive general education; postgraduate work or its equivalent in economics, political science, or history; legal training, and the ability to investigate and report with scientific precision. In order to keep this organization in a state of efficiency it is necessary to have this force of trained investigators employed continuously. It is not feasible to create a new force with each session of Congress. . . .

In considering the question of a Legislative Reference Service the Library is faced by an actual condition. Questions—similar to those enumerated in this report—from Members of Congress seeking information known to exist somewhere in the collections of the Library are inevitable. They were received by the Library before the present Legislative reference service was established. Congress expects this service from the Library and should the Legislative reference service be completely abolished the demand on the part of Congress would still continue.

Outside of the Legislative reference service the Library has no staff

<sup>2</sup> Later reports show that by 1939 every member of the Senate and 399 members of the House were using the Legislative Reference Service; and that the number of inquiries per Member rose from 3.5 for Representatives and 8.5 for Senators in 1920 to 7.5 and 20, respectively, in 1938.

for meeting this demand. For inquiries bearing on legislation its information service is organized as follows:

1. The Division of Bibliography, which can furnish to a Member of Congress a list of references to articles, books, and documents on legislative subjects. This assists the Member in gaining a survey of the literature. The Member himself must do his own research to find what he desires.

2. The Reading Room Division, which has jurisdiction over the collections of books which have been classified, catalogued, and put upon the shelves. The Reading Room is organized to deliver to a Member of Congress any publication which may be upon the shelves for which the Member may specifically ask. Beyond that it is not equipped to go. It can not attempt research.

3. The Periodical Division, which has jurisdiction over the newspapers and periodicals. It is equipped only to send a given publication to a Member upon request. It has no staff to search through newspapers or magazines for information that may be desired by a Member.

4. The Division of Documents, which is limited to acquiring and collating foreign and domestic documents. This is legislative material of high value, but the Division of Documents can not undertake to answer inquiries from it.

5. The Division of Law, including the Law Library at the Capitol, whose function is similar to that of the Reading Room in that it is prepared only to furnish specified books. It can furnish to the Member a designated law book or the text of a law to which an exact citation is given. It can not make investigations.

It will readily be seen that the Legislative reference service is the only branch of the Library which can meet the actual need of Members for exact data and is in a position, if properly provided for, to be of great value in making available legislative information which the Library can not otherwise furnish and which, should the Member or his secretary undertake the investigation, might prove both difficult and lengthy. On the other hand, a Legislative reference service inadequately provided for, necessitating the employment of untrained and improperly educated assistants, is worse than no service at all. Under such circumstances it is impossible to furnish a Member of Congress with prompt, systematic, and exact data.

The Legislative reference service of the Library of Congress does not do bill drafting. The questions of legislative reference and a bill drafting service have usually been considered together and in a number of the States they are combined in a single organization. Congress, how-

ever, has created two separate bill drafting services, one for the House and the other for the Senate. Their work is confined entirely to the form of a bill. They do not make investigations bearing upon questions of policy, but begin their work after the policy has been fixed. However, in determining the language of a bill numerous questions of policy arise and it is from this source that a large number of demands upon the Legislative reference service come. The Member or committee in charge of the bill may desire assistance in gathering certain information bearing on the question of policy. They may desire to know the state of existing Federal law, or what State legislation there may be in existence on the subject, or what decisions of the Supreme Court or State courts have been handed down, or whether there is pertinent foreign legislation or experience. They may desire certain translations or digests made of foreign or domestic laws, or certain statistics or economic information or historical data, or a statement of current facts or opinion bearing upon the proposed legislation. By assisting the Member or the committee in this manner, upon his request, the Legislative reference service becomes closely related to the bill drafting service, the latter often raising questions with the Member which lead him to call upon the former.

### b. Legislative Counsel

[Frederic P. Lee, "The Office of the Legislative Counsel," *Columbia Law Review*, vol. 29, pp. 381-403 (April, 1929).]

#### THE OFFICE OF THE LEGISLATIVE COUNSEL \*

To Columbia University there may be attributed a substantial measure of responsibility for the creation of the Office of the Legislative Counsel of the Congress. The Office is in part the outgrowth of the University's interest in public affairs and its policy of encouraging scientific participation in them by its law and other faculties. More immediately, however, the establishment of the Office is attributable to the University's action in affording Congress a practical demonstration of legislative draftsmanship.

#### THE LEGISLATIVE DRAFTING RESEARCH FUND

In 1911 the University received from Joseph P. Chamberlain a gift for the establishment of a Legislative Drafting Research Fund. The gift was to be expended by trustees appointed by the University, for

\*Most of the author's footnotes are omitted; those retained are numbered as in the original article. *Editors.*

research in problems of legislation and administration, with particular view to the better drafting of statutes. As the original trustees, the University selected the present Director of the Fund, Mr. Chamberlain, Professor of Public Law at Columbia University; John Bassett Moore, recently Judge of the Permanent Court for International Justice, then Hamilton Fish Professor of International Law and Diplomacy of the University; and Harlan Fiske Stone, Justice of the United States Supreme Court, then Dean of the Law School of the University. The research activities were placed under the direction of a staff headed by Middleton Beaman, Thomas I. Parkinson, and Professor Chamberlain.<sup>2</sup>

#### EARLY CONGRESSIONAL ACTION

The directors of the Fund early came to the conclusion that the scientific development of statute law required as one important contributing feature the establishment and maintenance of legislative drafting agencies operating in connection with State Legislatures and Congress. The idea was not novel even at that time, and the Congress itself had given considerable thought to the matter. Thus during 1912 extensive hearings were held by the House Committee on the Library on certain bills for the establishment of a congressional reference bureau in the Library of Congress. There appeared at the hearings several House leaders, the Librarian of Congress, the chairman of the President's Commission on Economy and Efficiency, a representative of the Legislative Drafting Research Fund of Columbia University, and others. Lord Bryce, the British Ambassador, after being assured of the non-political nature of the inquiry, afforded the unusual spectacle of a foreign diplomat testifying before a Committee of Congress. Lord Bryce's contribution was a detailed statement of the drafting functions of the Parliamentary Counsel of Great Britain. The testimony at the hearing brought out, among other matters, the distinction between the legislative reference function of furnishing economic and historical information and the legislative drafting function of furnishing legal assistance. Members of several of the State legislative reference bureaus emphasized this distinction in their discussion of the bill drafting work carried on in connection with their legislative reference duties.

[Then follows a description of the attempt to pass the necessary legislation in Congress.] . . .

With the objections made in the Senate the energy of the congressional movement expended itself for the while, even though the proposal to

<sup>2</sup> At that time Mr. Beaman was Law Librarian of the Library of Congress and Mr. Parkinson, Counsel for the Bureau of Municipal Research, New York City.

create the legislative drafting bureau had the support of the American Bar Association, and of such statesmen as Senator Elihu Root of New York, Speaker Champ Clark of Missouri, and House Minority leader James R. Mann of Illinois. An aggressive interest by Congress in any academic idea having no national political significance very frequently requires either a long educational process or the demonstration of the value of the idea through contact with its operation or practice.

#### THE CREATION OF THE OFFICE

The directors of the Legislative Drafting Research Fund determined that such a demonstration should be offered to Congress, and a portion of the resources of the Fund was devoted to that end. Early in 1916 Mr. Beaman was asked to go to Washington for the purpose of furnishing whatever aid he could to the Congress. The first contact with Congress arose in connection with the then pending legislation to create the United States Shipping Board. Judge J. W. Alexander, chairman of the House Committee on Merchant Marine and Fisheries, subsequently Secretary of Commerce, requested criticisms of the departmental draft being considered by a subcommittee. The suggestions made by Mr. Beaman as to the elimination of inconsistencies, and as to arrangement, expression, and perfection of administrative details proved acceptable. The scheduled full committee meeting was hurriedly postponed, and the measure was rewritten, reconsidered by the subcommittee and with minor exceptions approved by the subcommittee and full committee as rewritten.

Impressed by the results, Judge Alexander recommended to majority leader Claude Kitchin of North Carolina that he avail himself of similar services in the preparation of pending revenue legislation before the Ways and Means Committee of which Mr. Kitchin was chairman. The idea of consulting "university professors" as to the legal phases of legislation did not interest Mr. Kitchin at that time, although he subsequently became one of the most active and powerful supporters of the Office of the Legislative Counsel and remained so until his death. However, Judge Cordell Hull of Tennessee, chairman of the subcommittee on the estate tax, took advantage of the suggestion and soon converted Mr. Kitchin to the viewpoint of giving "the professors" a trial. Thereafter the volunteer services furnished by the Legislative Drafting Research Fund were for sheer lack of time confined for the most part to revenue matters before the Ways and Means Committee. The opportunities for work before the committee were most substantially furthered by the then



Clerk, Mr. John E. Walker. His appreciation of the value of the services rendered was reflected by the committee members as a result of the confidence had in his judgment and ability.

The short period remaining before passage permitted but little work to be done upon the Revenue Act of 1916. More opportunity for work was afforded by the committee in connection with the Revenue Act of 1917. Drafting suggestions were also made as to several of the provisions of the Liberty Loan and the War Finance Corporation bills. By the time of the preparation of the Revenue Act of 1918, the value of expert services in connection with the legal phases of the drafting of legislation had been demonstrated to the satisfaction of the Ways and Means Committee. Work upon that measure was done not only before that committee but also before the Finance Committee of the Senate and the managers of the two Houses in conference.

During the preparation of the Revenue Act of 1918, Representative John N. Garner of Texas, a member of the Ways and Means Committee, took the view that the committees of Congress should not be dependent upon favors from Columbia University, however willingly rendered, and that legislative provision should be made for the establishment of an official agency to render aid upon the legal phases of legislation. Mr. Garner presented his proposal to Mr. Kitchin, received Democratic approval, and then submitted it to the Republican members of the committee. The Republicans were agreeable on condition that Mr. Beaman be appointed the head of the House branch of the Office, that the appointments of the legislative counsel and their assistants were to be kept from the field of patronage, and that the services to be rendered were to be of the same sort as the committee had been furnished theretofore. Appropriate provisions were inserted in the revenue legislation by the committee and agreed to by the House and Senate.

The Office of the Legislative Counsel was not created to fulfill any academic ideas as to the desirability of legislative drafting services. The Office was constructed around one man with a view to providing for the continuance in an official capacity of services of a nature identical with those he had theretofore rendered, and no others. The Columbia demonstration had been successful where theoretical advocacy had failed.

The organic law <sup>14</sup> governing the new agency provided for the establishment of a Legislative Drafting Service under the direction of two

<sup>14</sup> As originally enacted, the organic law read as follows:

"Sec. 1303. (a) That there is hereby created a Legislative Drafting Service under the direction of two draftsmen, one of whom shall be appointed by the President of the Senate, and one by the Speaker of the House of Representatives, without reference to political affiliations and solely on the ground of fitness to perform



draftsmen. One of the draftsmen was to be appointed by the President of the Senate and the other by the Speaker of the House of Representatives, in each case "without reference to political affiliations and solely on the grounds of fitness to perform the duties of the office." Each draftsman was empowered, subject to the approval of his appointing authority, to make expenditures and employ and fix the compensation of assistants. The functions of the service were described as "aid in drafting public bills and resolutions and amendments thereto at the request of any committee of either House of Congress." As reported to the House, the Revenue Act of 1918 provided for a single agency to serve both House and Senate, headed by two draftsmen, both of whom had equal authority in directing the affairs of the service and both of whom were to serve committees of either House. Fearful, however, lest the Senate might obtain a disproportionate share of the available services, members of the House insisted upon the floor that a service be created composed of two independent branches, one under the exclusive direction of the Senate, the other under the exclusive direction of the House—neither in any wise subject to the control of the other. Appropriate amendments were adopted to carry out this determination.

Subsequently in the Revenue Act of 1924 the organic law was amended to change the name of the agency from Legislative Drafting Service to Office of the Legislative Counsel. This removed possibility of confusion with the Legislative Reference Service of the Library of Congress and also provided a name analogous to the Parliamentary Counsel of Great Britain. At the same time provision was made that the two Legislative Counsel should be allocated, by the joint action of the President of the Senate and the Speaker of the House of Representatives, to the appro-

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the duties of the office. Each draftsman shall receive a salary of \$5,000 a year, payable monthly. The draftsmen shall, subject to the approval of the President of the Senate and the Speaker of the House of Representatives, employ and fix the compensation of such assistant draftsmen, clerks, and other employees, and purchase such furniture, office equipment, books, stationery, and other supplies, as may be necessary for the proper performance of the duties of the service and as may be appropriated for by Congress.

"(b) The Drafting Service shall aid in drafting public bills and resolutions or amendments thereto on the request of any committee of either House of Congress, but the Library Committee of the Senate and the Library Committee of the House of Representatives, respectively, may determine the preference, if any, to be given to such requests of the committees of either House, respectively. The draftsmen shall, from time to time, prescribe rules and regulations for the conduct of the work of the service for the committees of each House, subject to the approval of the Library Committee of each House, respectively.

"(c) . . . One-half of all appropriations for the service shall be disbursed by the Secretary of the Senate and one-half by the Clerk of the House of Representatives." Section 1303 of the Revenue Act of 1918, 40 STAT. 1057, 1141-2.

priate grade in the Personnel Classification Act of 1923, and that within that grade compensation should be fixed from time to time by the individual action of the President of the Senate and the Speaker of the House.

### FUNCTIONS

The organic law of the Office, as has been noted, gives as the only description of the functions of the Office of the Legislative Counsel the provision that it "shall aid in drafting public bills and resolutions or amendments thereto." The precise nature of the aid required to be rendered is nowhere set forth in the law but is assumed to be common knowledge. The history of the creation of the Office, however, clearly indicates that the aid had in mind by the Ways and Means Committee and agreed to by the House and Senate, was aid identical with that which had been rendered them prior to the adoption of the provision. . . .

The functions may be summarized as the putting of the legislative intention in clear, concise language, providing an orderly arrangement, eliminating inconsistent provisions, and placing of substantive policies in such form (including provision for necessary administrative machinery) that they can be satisfactorily administered. On the other hand, the Office was to have no concern with the substantive policies.

In practice, however, the functions of the Office, while falling within the categories named, are far more complicated and difficult of execution than might be surmised from the above simple statement. It is impossible without actual experience to acquire an adequate conception of the extent of the analysis necessary, for instance, in working out and presenting to a committee the available alternatives as to the administrative details of the immigration quota law, or the legal bases for the Air Commerce Act of 1926, or the possible forms of business reorganizations, liquidations, and distributions to be foreseen and covered in the revenue acts. The putting of additional patches upon the highly involved and disorderly Trading with the Enemy Act requires long analysis of existing law, its interpretation, and departmental practice before a committee's intentions can be carried out with an approach to certainty. Even the matter of correcting a military record may result in a bill of only a half dozen lines but behind the language used is research into constitutional problems, the executive attitude as evidenced by a line of veto messages, the problem of altering existing records or merely the legal effect of existing records, and an understanding of the views and practices of the military and naval authorities, that will take several days even hastily to complete.

Despite the common impression of the layman, the aid rendered by the members of the Office of the Legislative Counsel is not primarily that of a professor of English. Correct grammar, elegance of diction, and proper punctuation, while desirable, are not essentials. The essentials and the time consuming elements are analyses of the problems and of the existing law and the administrative and technical details—in order that the general substantive policies may be built upon a sound under-structure that will make practicable the accurate execution of the policies. If the policy desired is simple and if it is clearly understood how it is to be enforced and executed, and if there is an accurate knowledge of the existing legal structure in which the new policy is to fit, the matters of clear and orderly expression usually solve themselves. It is the rare exception when a simple policy cannot be simply expressed. Usually the explanation of complex, indefinite, disorderly statutes is attributable to the existence of a complex policy whose ramifications cannot be definitely ascertained, or else is attributable to political or parliamentary exigencies.

Of course, in the federal statutes the inability to use many of the ordinary mechanical printing aids, such as contrasting types and indentions, also prevents the text from being more readily followed and gives an unnecessary appearance of complexity. The recently enacted Revenue Act of 1928 is the first real attempt of the Congress to make use of such mechanical printing aids. The understanding of that complex measure has been facilitated by means of cross references, by use of bold face and italic type, by use of indentions to indicate exceptions or subordinate provisions, and by use of supplements to set apart relatively unimportant matter or matter not of general application. The new set-up was developed by the Office of the Legislative Counsel at the request of the Joint Committee on Internal Revenue Taxation and in cooperation with its counsel.

In all matters of drafting, knowledge of constitutional and administrative law is invaluable. Constitutional restrictions upon legislative action must always be borne in mind. The relations between the three branches of Government, so far as prescribed by the Constitution, are very commonly involved in matters of legislation. Again, most of the complex legislative problems today involve extensive executive machinery for enforcement and administration. In the legislative provision for this machinery there must be met the many administrative and constitutional law problems involved in the form in which the executive action may properly express itself and in the judicial review of such action.

A form of drafting aid that has developed since the creation of the Office is the preparation of memoranda or opinions in response to re-

quests either for legal materials or for the opinion of the Office in connection with pending legislative matters. Compliance with such requests has taken up a substantial portion of the time of members of the Office. Usually the questions involved are the constitutional powers of the Congress or the interpretation of existing statutory law. The opinions may be exemplified by those denying the authority of Congress to regulate rents in the District of Columbia under the federal taxing power, but supporting the power of Congress to regulate such rents, during the continuance of the emergency, under its general police powers with respect to the District of Columbia; sustaining the constitutionality of the Packers and Stockyards Act as a regulation of interstate and foreign commerce; sustaining the constitutionality of the Ship Mortgage Act provisions for foreclosure of vessel mortgages in the federal courts in admiralty; denying the power of Congress to regulate grain futures under the taxing powers; supporting the power of Congress to provide for a national referendum upon the Eighteenth Amendment; supporting the power of Congress to enact the provisions of the Revenue Act of 1926 imposing a federal estate tax against which may be credited state inheritance taxes up to 80 per centum of the amount of federal estate tax; and sustaining the power of the Senate to originate a bill providing for a bond issue in connection with Boulder Dam.<sup>26</sup> Rarely are ques-

<sup>26</sup> The wide range of topics may be further illustrated by the memoranda and opinions furnished upon the following subjects:

Would the imposition by the United States of a tariff duty at a rate imposed by a foreign country upon similar imports violate the most favored-nation treaty clauses?

Would adoption of resolution to admit refugees from Thrace and Asia Minor, without compliance with existing immigration laws, conflict with provisions of existing treaties?

Has the Senate power to reconsider the adoption of the resolution advising and consenting to the adherence on the part of the United States to the statute and protocol of signature of the statute of the Permanent Court of International Justice?

Has the State of Oregon the constitutional power to enact necessary legislation to provide funds required under terms of certain proposed contracts between the United States and Oregon with reference to settlement of reclamation projects?

Has Congress power to enact legislation prohibiting the discrimination, mutilation, and improper use of the flag of the United States?

Has the President power in the absence of specific Congressional legislation, to advance public funds for the relief of Mississippi flood sufferers?

What are the constitutional privileges of a witness against self-incrimination in testimony before a Congressional committee?

Has Congress power to enact legislation providing for compulsory voting at elections for the President and Members of Congress?

Can Congress repeal the resolution proposing the Child Labor Amendment to the Constitution?

What are the respective powers of the States and Congress with regard to the ratification, rejection, and withdrawal of proposed amendments to the Federal Constitution?

*(Continued on next page.)*

tions asked upon points which have been decided by the courts. The Congress, inasmuch as it is usually dealing with novel subject matters that have not yet been the subject of litigation, must commonly deal with correspondingly novel legal problems.

A closely associated type of drafting aid is the preparation of legal arguments to be included in committee reports which are in support of the validity of proposed legislation. As illustrations there may be cited the arguments sustaining the validity of the Air Commerce Act of 1926; and the validity of the McNary-Haugen bill.

In the case of opinions, the opinion given is that of the Office. The opinion is not a mere brief or argument written to support a position previously taken by a committee or Member of Congress. On the other hand there are many instances in which briefs or arguments are, upon request, written to support a previously announced position without regard to whether such position conforms to the legal views of the Office. Such briefs or arguments, however, do not in any instance purport, as do formal opinions, to express the legal views of the Office.

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Has the Senate the constitutional power to adopt an amendment to its rules requiring conformity to certain corrupt practice restrictions in the election of any person claiming to be entitled to a seat in the Senate?

What are the powers of Congress to enact legislation providing for workmen's compensation for death or injury to longshoremen?

Has Congress power to prohibit the removal of labels on caustic alkalis and poisons after interstate transportation has ceased?

Has the President power to appoint state officers as officers or agents of the Federal Government?

What would be the effect upon the United States Code of passage of proposed Merchant Shipping Code?

Has Congress power to enact "interim tariff" legislation?

Has the Senate power to punish for contempt?

What course of procedure is open to the Senate in the case of Mally O. Daugherty following the Supreme Court decision therein?

What are the powers of Congress as to converting state corporations into federal corporations?

Has Congress power to create a federal board some of the members of which are appointed by Governors of the several States and others by private agencies?

Has Congress power to vest in the Congress the power of appointment and removal of the members of the United States Tariff Commission?

What legislation can the Congress enact to meet the various Supreme Court decisions under section 11 of the LaFollette Seamen's Act of 1915 with respect to the deduction of payments of advance wages and allotments to seamen upon foreign vessels in foreign ports?

Has Congress power to enact divesting legislation providing for the subjection to state control of the transmission of electric energy in interstate commerce?

Has Congress power to enact divesting legislation providing for state regulation of the shipment of convict-made goods in interstate commerce?

Is the due process clause of the Fifth Amendment a limitation upon the Congressional power to regulate the consolidation of railroads engaged in interstate commerce?



The Office also on occasion prepares compilations of statutes or legal materials for use in connection with pending legislation. This may be typified by the compilation of legislation relating to alien property, the compilation of the Federal Farm Loan Act, as amended, the compilation of law memoranda upon civil aeronautics, and the compilation of internal revenue laws.

The work of the Office is not solely desk work. Commonly appearances are made before committees of either House in executive session. In addition, in the case of important measures, members of the Office are frequently on the floor to assist the chairman of the committee or ranking minority member. Also members of the Office appear before conference committees of the two Houses to aid in drafting the agreements reached in conference and the preparation of conference reports and statements of the managers of the House. Appearances in committee are of the utmost importance in ascertaining speedily and with accuracy the desires of the committee and in presenting and in explaining the legal considerations involved in various drafts prepared.

#### SERVICE REQUESTS

Under its organic law, the Office is directed to aid committees upon public bills, and that constitutes its primary and most extensive work. This provision of the organic law is not construed as barring aid to individual members upon public bills and aid to committees and individual members on private bills when such aid does not interfere with the work for committees on public bills. The Office meets with comparatively few requests for aid to committees on private bills. There are, however, a very great number of requests for aid to individual members on both public and private bills. The aid rendered individual members is far more extensive in the case of the Senate branch of the Office than in the case of the House branch. The reason lies in the fact that, in general, committee action in the Senate is not as extensive as committee action in the House. The perfection and the handling of a particular piece of legislation is more often than not left to a single Senator. He assumes full responsibility therefor. The smaller number of Senators make this individual responsibility the more necessary. A Senator is generally a member of several important committees rather than of one only, as is usual in the case of a Representative. Of course many House leaders are as heavily burdened as Senators but usually, most members of a House committee have more time available for devoting to intensive consideration of a measure before the committee than



have the members of the corresponding Senate committee. This practical situation is reflected in the far greater number of bills drafted for individual members by the Senate branch of the Office than by the House branch.

The statistics available for the Senate branch of the Office show that for the first session of the 70th Congress, a long session from December, 1927, to May, 1928, the Senate office fulfilled 708 requests for assistance, of which number 38 were for committees and 670 were for individual members. Statistics for other years show a steady increase in the number of requests complied with, long sessions being compared with long sessions and short sessions with short sessions.<sup>34</sup> Statistics also show steady increase in the total number of Senators served.

It should be understood, however, that the number of requests fulfilled is no criterion of the amount of work done. Measured in man-hours, it is believed that if records had been kept they would show that the work, for instance, upon the Revenue Act of 1926 and the McNary-Haugen bill during the first session of the 69th Congress more than equalled the work expended upon all the other 475 requests made during that session.

The amount of work required during sessions of Congress has been in excess of that which could be completed during a normal daily working period. For that reason, night and Sunday work have become usual rather than exceptional. This pressure is unfortunate for it makes more probable oversight and error. However, it seems unpreventable for the most part for the reason that it arises from hurriedly realized political necessities and from the speed of action on the floor of either House and of committees during the final stages of consideration of

<sup>34</sup> The following table sets forth the number of requests made to and complied with by the Senate branch for Committees and individual Members for periods for which statistics are available:

<i>Period</i>			<i>Committee Requests</i>		<i>Individual Requests</i>	
<i>December 1 to December 1</i>			<i>Short Sessions</i>	<i>Long Sessions</i>	<i>Short Sessions</i>	<i>Long Sessions</i>
1920	—	1921	19	..	194	...
1921	—	1922	..	13	...	287
1922	—	1923	11	..	180	...
1923	—	1924	..	37	...	284
1924	—	1925	24	..	172	...
1925	—	1926	..	47	...	430
1926	—	1927	23	..	270	...
1927	—	1928	..	45	...	696
1928	to Mar. 4,	1929	25	..	325	...

each piece of legislation. In some instances, of course, the pressure is due to the fact that individual members are insistent upon immediate response to their requests. While the work of the Office in the aggregate is large, the amount done for any one member is usually small. His requests are infrequent. Further, he may not appreciate the extent of the research and other work involved. The changing personnel of Congress will probably prevent possibility of any substantial change in viewpoint through explanation.

The assistance of the Office in drafting legislation is, of course, rendered only upon request. Compared with the number of bills receiving committee consideration, the number of bills upon which assistance is rendered by this Office is relatively small. Nevertheless, among the measures upon which the Office renders aid may usually be found at least a half of the more important bills other than appropriation bills. Often the percentage is higher. Appropriation bills are in no case handled by the Office. They are prepared entirely by the expert Clerks of the House and Senate Appropriations Committees and their staffs trained through long experience in the preparation of this particular type of bill which does not ordinarily involve the drafting problems common to substantive legislation.

The execution of individual requests is, in general, undertaken in order of the receipt of the request. Individual requests for assistance are, in accordance with law, subordinated to committee requests. Requests for amendments of bills pending upon the floor or in committee are given preference. Delay would make completion of the work futile. Further, a large measure requiring the work of one or more men for two or three weeks is not allowed to delay the fulfillment of subsequent individual requests requiring only a comparatively small amount of work. While a general rule could hardly be enunciated, the principle running through the order of consideration given is that no unfair preference is knowingly given in the execution of the requests of the various members. This principle is followed irrespective of the criticisms that it has aroused in isolated cases.

The question of what the Office does during the recesses of Congress is one that readily occurs and is of interest, not only to members of the Appropriations Committees, but also quite frequently to the merely curious laymen. A common impression is that there is nothing to do. Like many common impressions this one is rather at variance with the facts. Until the 67th Congress, sessions were so nearly continuous that the question of interim work was almost academic. During the recent recesses, the Office has found itself fully employed in drafting in con-

nection with large measures to be considered the following session. Further, committees frequently sit during the recesses in the consideration of revenue and other legislation. Moreover, a large number of individual requests for drafts of bills are always received during the two months or so preceding the opening of a session. It would be desirable, if the recesses afforded time, for research to be made into many of the recurrent problems of administrative, constitutional, and statute law met with by the Office. Such research, however, has not, as yet, proved possible to any great extent.

#### INTERNAL ADMINISTRATION

*Personnel.* Under the organic law the appointments of the two Legislative Counsel are to be made without reference to political affiliations and solely on the grounds of fitness to perform the duties of the Office.<sup>36</sup> The Legislative Counsel have also observed this principle in the appointment of their assistants, together with the policy that appointees should not be engaged in political activities. This policy has been adopted for the reason that a man who has been engaged in political activities usually does not command equally the confidence of Members of Congress of both parties. He would not only find himself constantly embarrassed in his work but would lessen the effectiveness of the whole Office, for its members must constantly work in confidential relationships with both Republicans and Democrats.

Members of the legal staff of the Legislative Counsel are, under the policy of the Office, required to be graduates of recognized law schools and members of the bar. In addition, they are usually required to have some special training, as for instance, in the Legislative Drafting Research Fund of Columbia University, or in fields of public law, taxation, and the like. At the present time, the normal force of each branch of

<sup>36</sup> The appointment of Mr. John E. Walker, former Legislative Counsel of the Senate, presented an interesting situation. Mr. Walker had been Clerk of the Ways and Means Committee of the House, and Deputy Commissioner of Internal Revenue, and Special Assistant to the Secretary of the Treasury under Democratic administrations. In accordance with the advice of the Legislative Counsel of the House and the retiring Legislative Counsel of the Senate, Mr. Walker was recommended by Senator Penrose, Republican, chairman of the Committee on Finance of the Senate, and Senator Lodge, Republican floor leader of the Senate, for appointment as Senate Legislative Counsel. Vice-President Coolidge made the appointment upon these recommendations. Senator Penrose issued a public statement to the effect that in obtaining experts to fill the Office of Legislative Counsel, political affiliations were unimportant and Mr. Walker, a Democrat, was, in his judgment, the best qualified candidate.

the Office is three assistant counsel, one law assistant, and a clerk and assistant clerk. Usually there are one or more vacancies in the legal staff. This results from the difficulty in retaining high grade men at salaries which, while liberal in view of governmental standards, are low as compared with earnings that may be had in outside practice. . . .

#### STATUTE LAW RESEARCH AND TRAINING

As an unavoidable part of its functions under existing conditions of legal research and education, the Office of the Legislative Counsel must, in a measure, serve as a training school for new members of its force. Rarely can there be found young lawyers who are competent, without long periods of additional training, to deal effectively with the technical problems of legislation. Furthermore, the Office must conduct a considerable amount of research in the fields of statute and administrative law in order to have available materials for which there is a recurrent office demand. Investigations as to the legal effectiveness of statutory declarations of fact or of constitutional interpretation; as to the principles of judicial review of interpretative administrative regulations and regulations having the effect of law; as to the simplification of the contents of statutes along lines illustrated by the Revenue Act of 1928; as to the legal continuity of the provisions of statutes re-enacted without change, or amended, or repealed by an amendatory substitute,—will serve as illustrations of such Office research.

In providing such training and in conducting such research, the Office of the Legislative Counsel is attempting, in a meager fashion and only so far as its own necessities demand, to fill a gap that the law schools and other legal research and training agencies have failed to close. It is believed that the failure results from a lack of appreciation that the two law-making institutions, the courts and the legislatures, are entitled to an equality of consideration in academic and research fields. . . .

#### 84. AMOUNT OF LEGISLATION

The tremendous amount of legislation enacted by Congress, and the increase in such legislation from year to year, have been a matter for considerable comment. The fact that the number of actual working days is comparatively small and that much of this legislation is acted upon during the closing days of a session is ground for further comment and criticism.

## a. Amount of Legislation, 1789-1925

[*Congressional Record*, vol. 66, pt. 5, p. 5605.]*Number of laws enacted by Congress (1789-1925)*

	Public			Private			Total
	Acts	Resolutions	Total	Acts	Resolutions	Total	
First.....	94	14	108	8	2	10	118
Second.....	64	1	65	12	.....	12	77
Third.....	94	9	103	24	.....	24	127
Fourth.....	72	3	75	10	.....	10	85
Fifth.....	135	2	137	18	.....	18	155
Sixth.....	94	6	100	12	.....	12	112
Seventh.....	78	2	80	15	.....	15	95
Eighth.....	90	2	92	18	.....	18	110
Ninth.....	88	2	90	16	.....	16	106
Tenth.....	87	1	88	17	.....	17	105
Eleventh.....	90	2	92	25	.....	25	117
Twelfth.....	162	6	168	39	.....	39	207
Thirteenth.....	167	16	183	88	.....	88	271
Fourteenth.....	163	11	174	124	1	125	299
Fifteenth.....	136	20	156	101	.....	101	257
Sixteenth.....	109	8	117	91	.....	91	208
Seventeenth.....	130	6	136	102	.....	102	238
Eighteenth.....	137	4	141	194	.....	194	335
Nineteenth.....	147	6	153	113	.....	113	266
Twentieth.....	126	8	134	100	1	101	235
Twenty-first.....	143	9	152	217	.....	217	369
Twenty-second.....	175	16	191	270	1	271	462
Twenty-third.....	121	7	128	262	.....	262	390
Twenty-fourth.....	129	14	143	314	1	315	458
Twenty-fifth.....	138	12	150	376	6	382	532
Twenty-sixth.....	50	5	55	90	2	92	147
Twenty-seventh.....	178	23	201	317	6	323	524
Twenty-eighth.....	115	27	142	131	6	137	279
Twenty-ninth.....	117	25	142	146	15	161	303
Thirtieth.....	142	34	176	254	16	270	446
Thirty-first.....	88	21	109	51	7	58	167
Thirty-second.....	113	24	137	156	13	169	306
Thirty-third.....	161	27	188	329	23	352	540
Thirty-fourth.....	127	30	157	265	11	276	433

## Number of laws enacted by Congress (1789-1925)—Continued

	Public			Private			Total
	Acts	Resolutions	Total	Acts	Resolutions	Total	
Thirty-fifth . . . . .	100	29	129	174	9	183	312
Thirty-sixth . . . . .	131	26	157	192	21	213	370
Thirty-seventh . . . . .	335	93	428	66	27	93	521
Thirty-eighth . . . . .	318	93	411	79	25	104	515
Thirty-ninth . . . . .	306	121	427	228	59	287	714
Fortieth . . . . .	226	128	354	380	31	411	765
Forty-first . . . . .	313	157	470	235	64	299	769
Forty-second . . . . .	514	16	530	450	2	452	982
Forty-third . . . . .	392	23	415	441	3	444	859
Forty-fourth . . . . .	251	27	278	292	10	302	580
Forty-fifth . . . . .	255	48	303	430	13	443	746
Forty-sixth . . . . .	288	84	372	250	28	278	650
Forty-seventh . . . . .	330	89	419	317	25	342	761
Forty-eighth . . . . .	219	65	284	678	7	685	969
Forty-ninth . . . . .	367	57	424	1,025	3	1,028	1,452
Fiftieth . . . . .	508	62	570	1,246	8	1,254	1,824
Fifty-first . . . . .	470	80	550	1,633	7	1,640	2,190
Fifty-second . . . . .	347	51	398	318	6	324	722
Fifty-third . . . . .	374	89	463	235	13	248	711
Fifty-fourth . . . . .	356	78	434	504	10	514	948
Fifty-fifth . . . . .	449	103	552	866	5	871	1,423
Fifty-sixth . . . . .	383	60	443	1,498	1	1,499	1,942
Fifty-seventh . . . . .	423	57	480	2,309	1	2,310	2,790
Fifty-eighth . . . . .	502	73	575	3,465	1	3,466	4,041
Fifty-ninth . . . . .	692	83	775	6,248	1	6,249	7,024
Sixtieth . . . . .	350	61	411	234	1	235	646
Sixty-first . . . . .	525	69	594	285	3	288	882
Sixty-second . . . . .	457	73	530	180	6	186	716
Sixty-third . . . . .	342	75	417	271	12	283	700
Sixty-fourth . . . . .	400	58	458	221	5	226	684
Sixty-fifth . . . . .	348	56	404	48	.....	48	452
Sixty-sixth . . . . .	401	69	470	120	4	124	594
Sixty-seventh . . . . .	550	105	655	275	1	276	931
Sixty-eighth . . . . .	632	75	707	289	.....	289	996
Total . . . . .	16,914	2,836	19,750	29,787	523	30,310	50,060

[NOTE.—The distinction between the terms public and private, as used in the Statutes at Large, is somewhat arbitrary. Prior to 1845 a number of laws were printed in both groups; these have been classed as public only, in the above table. The decided reduction in the number of private acts beginning with the Sixtieth Congress was caused primarily by the combining of a large number of pension bills in a single omnibus pension bill.]



## b. Work of House of Representatives

[Calendars of the House of Representatives and History of Legislation,  
76th Cong., 1st Sess. (Final Edition), pp. 183-184.]

**STATISTICAL RECAPITULATION AND COMPARISON, SECOND  
SESSION (SPECIAL) SEVENTY-FIFTH; FIRST SESSION SEV-  
ENTY-FIFTH; FIRST SESSION SEVENTY-FOURTH; FIRST  
SESSION SEVENTY-THIRD; FIRST SESSION SEVENTY-SEC-  
OND**

**HOUSE OF REPRESENTATIVES**

	First Session Seventy- sixth Congress	Second Session (Special) Seventy- fifth Congress	First Session Seventy- fifth Congress	First Session Seventy- fourth Congress	First Session Seventy- third Congress
Convened.....	Jan. 3, 1939	Nov. 15, 1937	Jan. 5, 1937	Jan. 3, 1935	Mar. 9, 1933
Adjourned.....	Aug. 5, 1939	Dec. 21, 1937	Aug. 21, 1937	Aug. 26, 1935	June 16, 1933
Calendar days.....	148	27	154	163	100
Legislative days in session...	147	26	153	161	72
Bills introduced.....	7,541	456	8,333	9,270	6,130
Joint resolutions introduced..	381	50	497	408	208
Simple resolutions introduced..	297	42	343	373	196
Concurrent resolutions intro- duced.....	35	1	27	40	24
Total bills and resolutions	8,254	549	9,200	10,091	6,558
Public laws:					
Approved.....	452	2	487	415	82
Over veto.....			2		
Total, public laws.....	452	2	489	415	82
Public laws and resolutions..	452	5	489	67	11
Private laws and resolutions..	267		410	358	12
Grand total, public and private laws and reso- lutions.....	719	5	899	840	105
Committee reports:					
Union Calendar.....	578	9	595	687	70
House Calendar.....	186	6	194	265	90
Private Calendar.....	517	1	710	874	76
Special reports.....	190	4	7		
Total.....	1,471	20	1,506	1,826	236
Reported bills acted upon:					
Union Calendar.....	476	2	505	448	50
House Calendar.....	171	2	182	208	78
Private Calendar.....	503	0	698	726	4
Special reports.....	178	4	7		
Total acted upon.....	1,328	8	1,392	1,382	132
Reported bills pending.....	143	12	114	444	104
Total reported.....	1,471	20	1,506	1,826	236
Resolutions agreed to:					
Simple.....	147	15	147	146	98
House concurrent.....	15	1	11	17	4
Senate concurrent.....	16		12	11	2
Total agreed to.....	178	16	170	174	104

The total laws of the 1st session, Seventy-sixth Congress numbered 719, which were divided as follows: House bills, 408; House joint resolutions, 39; Senate bills, 256; and Senate joint resolutions, 16.

The House passed 615 House bills and 46 House joint resolutions and 279 Senate bills and 18 Senate joint resolutions.

Vetoed, 58. House bills vetoed, 11; Senate bills vetoed, 7; House bills pocket vetoed, 22; Senate bills pocket vetoed, 18.

There were introduced in the Senate 2,974 bills, 186 joint resolutions, 29 concurrent resolutions, and 181 simple resolutions; in the House, 7,541 bills, 297 resolutions, 381 joint resolutions, 35 concurrent resolutions.

The Senate committees made 1,154 reports.

The House committees made 1,471 reports.

Fourteen Senate bills and two Senate joint resolutions were pending on House calendars.

There were 500 bills entered upon the Consent Calendar, of which 448 were acted upon, leaving 52 upon the calendar.

There were 157 roll calls, divided as follows: 68 quorum calls and 89 yeas and nays.

Nineteen motions to discharge committees from consideration of bills were filed, 18 of which did not receive a sufficient number of signatures for entry on the calendar of such motions. One motion to discharge committees was placed on the Discharge Calendar.

The President transmitted to the House 5 messages which were referred to the Committee of the Whole House on the State of the Union; executive departments transmitted 1,061 communications. Petitions filed numbered 5,188.

## CHAPTER XIV

### THE JUDICIAL SYSTEM

#### 85. CONGRESS AND THE COURTS

The constitutional provisions with respect to the federal judiciary are very meager, hence must be supplemented by statute in order to provide an effective system. The power of Congress over the inferior federal courts is obviously great, but it may be noted that Congress has also considerable power to legislate concerning the organization, jurisdiction, and functioning even of the Supreme Court. The great charter of the federal judicial system is the Judiciary Act of 1789, which has since been amended on numerous occasions, and has been supplemented with other important legislation from time to time.

##### a. Act Decreasing Size of Supreme Court

[*U. S. Statutes at Large*, vol. 14, p. 209.]

CHAP. CCX.—*An Act to fix the Number of Judges of the Supreme Court of the United States, and to change certain Judicial Circuits.*

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That no vacancy in the office of associate justice of the supreme court shall be filled by appointment until the number of associate justices shall be reduced to six; and thereafter the said supreme court shall consist of a chief justice of the United States and six associate justices, any four of whom shall be a quorum; and the said court shall hold one term annually at the seat of government, and such adjourned or special terms as it may find necessary for the despatch of business.<sup>1</sup>

[Then follows a reconstitution of the judicial circuits.]

Approved, July 23, 1866.

##### b. Act Creating Circuit Courts of Appeals

[*U. S. Statutes*, vol. 26, pp. 826-830.]

CHAP. 517.—An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes.

<sup>1</sup> The Supreme Court was again increased to nine by Act of April 10, 1869.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That there shall be appointed by the President of the United States, by and with the advice and consent of the Senate, in each circuit an additional circuit judge, who shall have the same qualifications, and shall have the same power and jurisdiction therein that the circuit judges of the United States, within their respective circuits, now have under existing laws, and who shall be entitled to the same compensation as the circuit judges of the United States in their respective circuits now have.

SEC. 2. That there is hereby created in each circuit a circuit court of appeals, which shall consist of three judges, of whom two shall constitute a quorum, and which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. . . .

SEC. 3. That the Chief-Justice and the associate justices of the Supreme Court assigned to each circuit, and the circuit judges within each circuit, and the several district judges within each circuit, shall be competent to sit as judges of the circuit court of appeals within their respective circuits in the manner hereinafter provided. In case the Chief-Justice or an associate justice of the Supreme Court should attend at any session of the circuit court of appeals he shall preside, and the circuit judges in attendance upon the court in the absence of the Chief-Justice or associate justice of the Supreme Court shall preside in the order of the seniority of their respective commissions.

In case the full court at any time shall not be made up by the attendance of the Chief-Justice or an associate justice of the Supreme Court and circuit judges, one or more district judges within the circuit shall be competent to sit in the court according to such order or provision among the district judges as either by general or particular assignment shall be designated by the court: *Provided*, That no justice or judge before whom a cause or question may have been tried or heard in a district court, or existing circuit court, shall sit on the trial or hearing of such cause or question in the circuit court of appeals. A term shall be held annually by the circuit court of appeals in the several judicial circuits at the following places: In the first circuit, in the city of Boston; in the second circuit, in the city of New York; in the third circuit, in the city of Philadelphia; in the fourth circuit, in the city of Richmond; in the fifth circuit, in the city of New Orleans; in the sixth circuit, in the city of Cincinnati; in the seventh circuit, in the city of Chicago; in the eighth circuit, in the city of Saint Louis; in the ninth circuit, in the city

of San Francisco;<sup>2</sup> and in such other places in each of the above circuits as said court may from time to time designate. The first terms of said courts shall be held on the second Monday in January, eighteen hundred and ninety-one, and thereafter at such times as may be fixed by said courts.

SEC. 4. That no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts, but all appeals by writ of error or otherwise, from said district courts, shall only be subject to review in the Supreme Court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of error, or otherwise, from the existing circuit courts shall be had only in the Supreme Court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.

SEC. 5. That appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the Supreme Court in the following cases:

In any case in which the jurisdiction of the court is in issue: in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision.

From the final sentences and decrees in prize causes.

In cases of conviction of a capital or otherwise infamous crime.

In any case that involves the construction or application of the Constitution of the United States.

In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.

In any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States.

Nothing in this act shall affect the jurisdiction of the Supreme Court in cases appealed from the highest court of a State, nor the construction of the statute providing for review of such cases.

SEC. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the

<sup>2</sup> A tenth circuit was created in 1929, with its seat in Denver; and one Supreme Court Justice has therefore since been assigned to two circuits.

circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, beings aliens and citizens of the United States or citizens of different States; also in all cases arising under the patent laws, under the revenue laws, and under the criminal laws and in admiralty cases, excepting that in every such subject within its appellate jurisdiction the circuit court of appeals at any time may certify to the Supreme Court of the United States any questions or propositions of law concerning which it desires the instruction of that court for its proper decision. And thereupon the Supreme Court may either give its instruction on the questions and propositions certified to it, which shall be binding upon the circuit courts of appeals in such case, or it may require that the whole record and cause may be sent up to it for its consideration, and thereupon shall decide the whole matter in controversy in the same manner as if it had been brought there for review by writ of error or appeal.

And excepting also that in any such case as is hereinbefore made final in the circuit court of appeals it shall be competent for the Supreme Court to require, by certiorari or otherwise, any such case to be certified to the Supreme Court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the Supreme Court.

In all cases not hereinbefore, in this section, made final there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars besides costs. But no such appeal shall be taken or writ of error sued out unless within one year after the entry of the order, judgment, or decree sought to be reviewed.

. . . . .

SEC. 15. That the circuit court of appeals in cases in which the judgments of the circuit courts of appeals are made final by this act shall have the same appellate jurisdiction, by writ of error or appeal, to review the judgments, orders, and decrees of the supreme courts of the several Territories as by this act they may have to review the judgments, orders, and decrees of the district court and circuit courts; and for that purpose the several Territories shall, by orders of the Supreme court, to be made from time to time, be assigned to particular circuits.

Approved, March 3, 1891.



### c. Act Abolishing Commerce Court

[Appropriations Act of Oct. 22, 1913. *U. S. Statutes*, vol. 38, pp. 208, 219.]

The Commerce Court, created and established by the Act entitled "An Act to create a Commerce Court and to amend the Act entitled 'An act to regulate commerce,' approved February fourth, eighteen hundred eighty-seven, as heretofore amended, and for other purposes," approved June eighteenth, nineteen hundred and ten, is abolished from and after December thirty-first, nineteen hundred and thirteen, and the jurisdiction vested in said Commerce Court by said Act is transferred to and vested in the several district courts of the United States, and all Acts or parts of Acts in so far as they relate to the establishment of the Commerce Court are repealed. Nothing herein contained shall be deemed to affect the tenure of any of the judges now acting as circuit judges by appointment under the terms of said Act, but such judges shall continue to act under assignment, as in the said Act provided, as judges of the district courts and circuit courts of appeals; and in the event of and on the death, resignation, or removal from office of any of such judges, his office is hereby abolished and no successor to him shall be appointed.

## 86. CHARACTER OF SUPREME COURT APPOINTMENTS

On account of the power of the Supreme Court, and its important position in the determination of legal and constitutional questions, it is commonly supposed that appointments to that Court are made purely on the basis of high character, legal learning, and judicial experience. However, the fact that the Court has become an important organ for the final determination of matters of national policy and of matters with political, social, and economic significance, has led to the consideration of other factors as well in the selection of the Judges.

### a. View of William H. Seward

[Quoted in Beard, *Rise of American Civilization* (The Macmillan Company), vol. II, p. 8.]

How fitting does the proclamation of its opening close with the invocation: "God save the United States and the honorable court." . . . The court consists of a chief justice and eight associate justices. Of these five were called from slave states and four from free states. The opinions and bias of each of them were carefully considered by the President and Senate when he was appointed. Not one of them was found wanting in soundness of politics, according to the slaveholders' exposition of the Constitution, and those who were called from the free states were

even more distinguished in that respect than their brothers from the slaveholding states.

b. View of President Roosevelt

[*Selections from the Correspondence of Theodore Roosevelt and Henry Cabot Lodge* (Charles Scribner's Sons), vol. II, pp. 228-230.]

Oyster Bay, N. Y.,  
September 4, 1906.

Personal.

Dear Cabot:

I knew how strongly Moody felt about Lurton. I did not know how you felt. I think you both are entirely in error. I say this frankly because I know you want me to talk frankly. Nothing has been so strongly borne in on me concerning lawyers on the bench as that the *nominal* politics of the man has nothing to do with his actions on the bench. His *real* politics are all important. In Lurton's case, Taft and Day, his two former associates, are very desirous of having him on. He is right on the negro question; he is right on the power of the Federal Government; he is right on the insular business; he is right about corporations; and he is right about labor. On every question that would come before the bench he has so far shown himself to be in much closer touch with the policies in which you and I believe than even White, because he has been right about corporations, where White has been wrong. I have grown to feel most emphatically that the Supreme Court is a matter of too great importance for me to pay heed to where a man comes from. While I have not clearly formulated this plan of which I am about to speak, I am tentatively taking into account the fact that if I appoint Lurton I *may* later be able to appoint Moody then saying "it is true that this is making two appointments from Massachusetts, but I have shown already in my appointment of a Tennessean and an ex-Confederate soldier, nominally a Democrat, that I pay heed only to the real needs of the Court, and I am doing the same thing in this case." I have not definitely made up my mind, but the above represents my present intention. . . .

Ever yours,

THEODORE ROOSEVELT.

Nahant, Mass.

Sept. 10, 1906.

Personal.

Dear Theodore:

Thank you for your letter of the 4th. I am glad that Lurton holds all the opinions that you say he does and that you are so familiar with his

views. I need hardly say that those are the very questions on which I am just as anxious as you that judges should hold what we consider sound opinions, but I do not see why Republicans cannot be found who hold those opinions as well as Democrats. The fact that there have been one or two Republican disappointments does not seem to me to militate against the proposition. What I care most about, more than any question of the moment, is the fundamental difference between the nationalist and the separatist. The Republican, like the Federalist and Whig, is by nature a liberal constructionist, and the Democrat, especially the Southern Democrat, is by nature, instinct and training the reverse. What I want on the bench is a follower of Hamilton and Marshall and not a follower of Jefferson and Calhoun whose disciples carried their doctrines into the practical form of secession. After what you have said I have no doubt that Judge Lurton is all right on all the great points you mention and I am not going to trouble you with further arguments on a question where you have made up your mind. I only want you to feel that my opinion is based on very broad and general grounds. I think that you are right about the locality argument, and although I said that to take three or four men from one circuit seemed to me an objection, I did not consider it a very serious one. I think that locality should be considered in the Supreme Court, but I do not think that it should ever be allowed to be dominant. . . .

Ever yrs,

H. C. LODGE.

## 87. JUDICIAL REVIEW

Perhaps the most important power possessed by the courts is that of passing upon the constitutionality of legislation, commonly called the power of judicial review. This power is not specifically granted by the Constitution, but was asserted by the Supreme Court in the case of *Marbury v. Madison*, and has been since accepted as belonging to the courts. The case arose out of the so-called "midnight appointments" of President Adams, among which was the appointment of William Marbury to be justice of the peace in the District of Columbia. His commission had been duly signed and sealed, but had not been delivered when Adams' term expired and Jefferson became president. Madison, as Jefferson's Secretary of State, refused to deliver the commission to Marbury, who thereupon brought suit in the Supreme Court for a writ of mandamus to compel such delivery. The Supreme Court held that the section of the Judiciary Act of 1789 which authorized the issuance of writs of mandamus by that Court was unconstitutional, and that although Marbury was entitled to his commission its delivery could not be compelled. Although the suit involved an insignificant office, Chief Justice Marshall took occasion to expound at some length the doctrine of judicial review, and it is for this the case is noted.

## a. Constitutional Basis

[*Marbury v. Madison* (1803), 1 Cranch 137, 176-179; 2 L. Ed. 60, 73-74.]

On the 24th of February, the following opinion was delivered by the Chief Justice.

*Opinion of the Court.* . . .

The authority, therefore, given to the Supreme Court, by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the Constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised.

The question whether an act repugnant to the Constitution can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary

means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of in the further consideration of this subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, com-

pletely obligatory. It would declare that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written constitution, would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejection.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

There are many other parts of the Constitution which serve to illustrate this subject.

It is declared that "no tax or duty shall be laid on articles exported from any State." Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the Constitution, and only see the law?

The Constitution declares "that no bill of attainder or ex post facto law shall be passed."

If, however, such a bill should be passed, and a person should be prosecuted under it, must the court condemn to death those victims whom the Constitution endeavors to preserve?

"No person," says the Constitution, "shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."

Here the language of the Constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare one



witness, or a confession out of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent that the framers of the Constitution contemplated that instrument as a rule for the government of courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, too, imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as—, according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that Constitution forms no rule for his government? if it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the Constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the Constitution, have that rank.

Thus, the particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void; and that courts, as well as other departments, are bound by that instrument. The rule must be discharged.

## b. Extent of Judicial Review

[*Report of Senate Committee on the Judiciary* (S. Rept. No. 711, 75th Cong., 1st Sess., June 7 [calendar day, June 14], 1937), pp. 46-49.]

### APPENDIX E

#### *Classification, by dissent, of cases invalidating acts of Congress*

Unanimous .....	30
1 Dissent .....	9
2 Dissents .....	14
3 Dissents .....	12
4 Dissents .....	11

*Federal laws enacted since Mar. 4, 1933, which have been passed upon  
by the Supreme Court*

The Court held the following such acts, or parts of such acts, to be unconstitutional:

- |  | Vote      |
|--|-----------|
| 1. Independent Offices Appropriation Act (48 Stat. 307, sec. 13):  |           |
| 1. <i>Booth v. U. S.</i> (291 U. S. 339), held void the provision of the bill reducing retired pay of Federal judges.....  | Unanimous |
| 2. Economy Act, 1933 (48 Stat. 11, sec. 17, part):   |           |
| 2. <i>Lynch v. U. S.</i> (292 U. S. 571), held void the provisions of said act which repealed all laws granting or pertaining to yearly renewable term insurance.....  | Unanimous |
| 3. National Industrial Recovery Act (48 Stat. 195, title I):   |           |
| 3. <i>Schechter Poultry Corp. v. U. S.</i> (295 U. S. 495), held void provisions of said act relating to codes.....  | Unanimous |
| 4. <i>Panama Refining Co. v. Ryan</i> (293 U. S. 388), held void Section 9 (c) of the National Industrial Recovery Act dealing with "hot oil".....   | 8-1       |
| 4. Gold Clause Resolution (48 Stat. 113):  |           |
| 5. <i>Perry v. U. S.</i> (294 U. S. 330), held void sec. 1 of said act insofar as applicable to gold clause in Government obligations (but recovery was denied because plaintiff did not show damages).....  | 8-1       |
| <p>NOTE.—Eight Justices concurred in holding the statute unconstitutional—Chief Justice Hughes, Justices Van Devanter, McReynolds, Brandeis, Sutherland, Butler, Roberts, and Cardozo; but Chief Justice Hughes and Justices Brandeis, Stone, Roberts, and Cardozo held that the petitioner was not entitled to recover in the suit because he had suffered no damage; while Justices McReynolds, Van Devanter, Sutherland, and Butler dissented on this point.</p> <p>Justice Stone dissented on the ground that, while he concurred with a majority of the Court in holding that the petitioner was not entitled to recover in the suit, because of failure to show any damage, he thought it "unnecessary and undesirable for the Court to undertake to say that the obligation of the gold clause in Government bonds is greater than in bonds of private individuals or that, in some manner and in some measure undefined, it has imposed restrictions upon the future exercise of the power to regulate the currency * * *. There is no occasion now to resolve the doubts which I entertain with respect to these questions. At present they are academic." He stated, therefore, that he did not join in so much of the opinion as held the act unconstitutional.</p> |           |
| 5. Railroad Retirement Act (48 Stat. 1283):  |           |
| 6. <i>R. R. Retirement Board v. Alton R. Co. et al.</i> (295 U. S. 330)...   | 5-4       |
| 6. Frazier-Lemke Bankruptcy Act, June 20, 1934 (48 Stat. 1289):  |           |
| 7. <i>Louisville Bank v. Radford</i> (295 U. S. 555).....  | Unanimous |
| 7. Amended Home Owners' Loan Corporation Act (48 Stat. 646):   |           |
| 8. <i>Hopkins Assn. v. Cleary</i> (296 U. S. 315), held void sec. 5 (i) providing for the conversion of State loan associations into Federal associations upon vote of 51 percent of votes cast,.....  | Unanimous |

8. Agricultural Adjustment Act (48 Stat. 31) :
  9. *U. S. v. Butler* (297 U. S. 1), provision relating to agricultural processing taxes held void..... 6-3
9. Agricultural Adjustment Act amendments (49 Stat. 750) :
  10. *Rickert Rice Mills v. Fontenot* (297 U. S. 110)..... Unanimous
10. Guffey Coal Act of 1935 (49 Stat. 991, ch. 824) :
  11. *Carter v. Carter Coal Co.* (298 U. S. 238) (4 Justices dissented in part)..... 6-3
11. Municipal Bankruptcy Act, 1935 (48 Stat. 798) :
  12. *Ashton v. Cameron Water Imp. Co.* (298 U. S. 513), readjusting of indebtedness by political subdivisions of States..... 5-4

Classification of above acts by  
dissent:

Unanimous.....	6
1 dissent.....	1
2 dissents.....	0
3 dissents.....	2
4 dissents.....	2

Classification of above cases by  
dissent:

Unanimous.....	6
1 dissent.....	2
2 dissents.....	0
3 dissents.....	2
4 dissents.....	2

The following laws, or parts of laws, enacted since March 4, 1933, have been held constitutional in whole or in part by the Supreme Court:

1. Trading With the Enemy Act (48 Stat. 510) :
  1. *Woodson v. Deutsche, etc., Vormals* (292 U. S. 449), restricting suits against Alien Property Custodian, the Treasurer of the United States, or the United States for recovery of deductions for administrative expenses made from alien property held by the Custodian..... Unanimous
2. District of Columbia jury law (49 Stat. 682, ch. 605) :
  2. *U. S. v. Wood* (299 U. S. 123), upheld the law making Government employees, etc., in the District of Columbia subject to jury duty..... 6-3
3. Revenue Act of 1936 (49 Stat. 1747, title VII, part) :
  3. *Anniston Mfg. Co. v. Davis, Collector* (May 17, 1937), held that a new administrative procedure for recovery of taxes collected under the A. A. A. is not unconstitutional on its face..... 8-1
4. Chaco Arms Embargo Act (48 Stat. 811) :
  4. *U. S. v. Curtiss-Wright Export Co.* (81 L. Ed. Adv. Op. 166), upheld the act as against the argument that it constituted a delegation of legislative power to the President..... 8-1
5. Sec. 77-B National Bankruptcy Act (48 Stat. 911, 915) :
  5. *Kuehner v. Irving Trust Co.* (81 L. Ed. Adv. Op. 248), upheld the limitation of claims of a landlord under indemnity clause of a lease to maximum of 3 years' rental..... Unanimous
6. Ashurst-Summers Act of July 24, 1935 (49 Stat. 494) :
  6. *Kentucky Whip & Collar Co. v. I. C. R. Co.* (81 L. Ed. Adv. Op. 183), upheld the prohibition against transporting in interstate commerce of convict-made goods..... Unanimous
7. Silver Purchase Act (48 Stat. 1178, ch. 674) :
  7. *U. S. v. Hudson* (81 L. Ed. Adv. Op. 261), upheld taxing certain transfers of silver..... Unanimous

8. Public Resolution No. 53, Trading with Enemy (48 Stat. 1267) :
  8. *Cummings v. Deutsche Bank, etc.* (81 L. Ed. Adv. Op. 333), upheld a resolution under said act postponing delivery of property seized thereunder until certain obligations are met..... Unanimous
9. Federal Declaratory Judgment Act, 1934 (49 Stat. 955) :
  9. *Aetna Life Ins. Co. v. Haworth* (81 L. Ed. Adv. Op. 394), held that said act fell within the ambit of congressional power when confined to cases of actual recovery..... Unanimous
10. Railway Labor Act of 1936 (48 Stat. 1185) :
  10. *Virginian Ry. v. System Federation No. 40* (Mar. 29, 1937), upheld the act which requires a railroad company to "treat with" authorized representatives of its employees in its application to mechanical "backshop" employees..... Unanimous
11. Second Frazier-Lemke Act (49 Stat. 943) :
  11. *Wright v. Vinton* (81 L. Ed. Adv. Op. 487), held that act does not violate due process clause of fifth amendment..... Unanimous
12. National Firearms Act (48 Stat. 1236) :
  12. *Sonzinsky v. U. S.* (81 L. Ed. Adv. Op. 556), excise tax on firearms and registration of firearms dealers upheld.... Unanimous
13. National Labor Relations Act of 1935 (49 Stat. 449) :
  13. *Associated Press v. N. L. R. B.* (81 Adv. Op. L. Ed. 603), upheld provisions of said act as applied to the employees of the Associated Press..... 5-4
  14. *N. L. R. B. v. Jones & Laughlin Steel Corporation* (81 L. Ed. Adv. Op. 563), upheld provisions of the act as applied to a steel corporation and its production employees..... 5-4
  15. *N. L. R. B. v. Freuhauf Tractor Co.* (81 L. Ed. Adv. Op. 582), upheld act as applied to a manufacturer of automobile trailers (80 percent of whose products are sold in other States)..... 5-4
  16. *N. L. R. B. v. Friedman-Harry Marks Clothing Co.* (81 L. Ed. Adv. Op. 585), upheld act when applied to a manufacturer of men's clothing (who shipped in 99 percent of his raw materials and shipped out 82 percent of the finished product to other States)..... 5-4
  17. *Washington, Virginia & Md. Coach Co. v. N. L. R. B.* (81 L. Ed. Adv. Op. 601), upheld the act as applied to an interstate motor-bus company..... Unanimous
14. Revenue Act of 1934 (48 Stat. 680, 763) :
  18. *Cincinnati Soap Co. v. U. S.* (May 3, 1937), upheld provision of Revenue Act of 1934 assessing processing tax on coconut oil from Philippines..... Unanimous
15. Social Security Act (49 Stat. 620) :
  19. *Stewart Machine Co. v. Davis* (May 24, 1937), upheld taxing provisions (title IX)..... 5-4
  20. *Helvering v. Davis* (May 24, 1937), upholds the validity of title II, providing for payment of old-age benefits..... 7-2
16. Gold-clause resolution (48 Stat. 113, sec. 1) :
  21. *Norman v. B. & O. R. Co.* (294 U. S. 240), upheld the validity of this act when abrogating gold-clause stipulations applied to private contracts..... 5-4

22. *Nortz v. U. S.* (294 U. S. 317), upheld gold-clause resolution in its requirement that holders of gold certificates accept legal tender currency of equal face value..... 5-4
23. *Holyoke Water Power Co. v. American Writing Paper Co.* (81 L. Ed. Adv. Op. 383), held that the gold-clause resolution of June 5, 1933, when abrogating a gold-clause stipulation in a private lease, does not violate the 5th amendment..... 5-4
- NOTE.—This same section of the gold-clause resolution was held unconstitutional by an 8-1 opinion so far as applicable to Government obligations. (See *Perry v. U. S.*, supra.)

NOTE.—In several cases, the Supreme Court has specifically refused to pass on the constitutionality of legislation, deciding the cases before them on other grounds, e. g.:

*Wilshire Oil Co. v. U. S.* (295 U. S. 100), where the Court held that a decision of a circuit court of appeals on the validity of the National Industrial Recovery Act was unnecessary; and refused to review the question on certificate.

*Moor v. Texas & N. O. R. Co.* (297 U. S. 101), the Court dismissed a writ of certiorari to review this refusal of the lower court to grant a mandatory injunction to compel carriage of cotton, on which the tax under the Cotton Control Act had not been paid, where plaintiff claimed the act was unconstitutional.

In a further case the Court held that a decision of a circuit court of appeals holding invalid subsection (b) (5) of section 77B of the Bankruptcy Act was "premature," and affirmed the judgment of another "entirely adequate ground" without expressing any opinion on the constitutionality of the Bankruptcy Act:

*Tennessee Publishing Co. v. Am. Nat'l Bank*, 290 U. S. 18 (unanimous).

*Ashwander v. T. V. A.* (297 U. S. 288) is cited by some writers as a decision favorable to the administration, but in that case the Court carefully confined its opinion to the particular contract before it, which called for sale of power generated at the Wilson Dam, constructed under the National Defense Act of 1916. "We express no opinion as to the validity \* \* \* of the T. V. A. Act or of the claims made in the pronouncements of the Authority" apart from the particular contract.

Classification of above acts by dissent:

Unanimous.....	10
1 dissent.....	2
2 dissents.....	0
3 dissents.....	1
4 dissents.....	3

Classification of above cases by dissent:

Unanimous.....	11
1 dissent.....	2
2 dissents.....	1
3 dissents.....	1
4 dissents.....	8



NUMBER OF CASES, AS COMPARED WITH NUMBER OF PROVISIONS  
HELD UNCONSTITUTIONAL

Seventy-six cases in 148 years :  
     1 case in the first 50 years  
     19 cases in the next 50 years  
     56 cases in the last 48 years

} out of approximately 40,000 cases decided by the Supreme Court.

Sixty-four different acts construed :

    3 enacted between 1789 and 1839, out of a total of 5,741.

    22 enacted between 1839 and 1899, out of a total of 15,964.

    39 enacted from 1889 through June 6, 1937, out of a total of 36,957.

Eighty-four different provisions of law in some respect invalidated, ranging from an entire act to the necessary implication of a single phrase.

(This tabulation, with revisions, was taken from W. S. Gilbert's Provisions of Federal Law Held Unconstitutional by the Supreme Court of the United States (1936), page 95. The case of *Counselman v. Hitchcock* (142 U. S. 547) is sometimes considered as invalidating R. S. 860; e.g., see Warren, Congress, the Constitution, and the Supreme Court, p. 314. Gilbert's reasons for not including this case in his summary are given on p. 89.)

Acts through the 72d Cong.....	55,685
Acts of the 73d Cong.....	975
Acts of the 74th Cong.....	1,724
	<hr/>
	2,699
Acts of 75th Cong. through June 6, 1937.....	278
	<hr/>
	2,977
Grand total.....	<hr/>
	58,662

There have been 11 cases invalidating provisions of Federal law which were decided by a majority of one (in each instance 5 to 4). These cases are :

*Ex parte Garland* (4 Wall. 333).

*Pollock v. Farmers' Loan and Trust Co.* (158 U. S. 601).

*Fairbank v. United States* (181 U. S. 283).

*Employers' Liability Cases* (207 U. S. 463).

*Hammer v. Dagenhart* (247 U. S. 251).

*Eisner v. Macomber* (252 U. S. 189).

*Burnet v. Cornado Oil & Gas Co.* (285 U. S. 393).

*Knickerbocker Ice Co. v. Stewart* (253 U. S. 149).

*Newberry v. United States* (256 U. S. 232).



*Railroad Retirement Board v. Alton R. R. Co.* (295 U. S. 330).  
*Ashton v. Cameron County Water Imp. Dist.* (298 U. S. 513).

## 88. THE COURTS AND SOCIAL POLICY

It is well recognized as a cardinal principle of the American system that policies should be fixed by the legislative body, leaving to the courts the determination of strictly legal questions. In the course of their exercise of judicial review, however, the courts appear on occasion to pass upon the wisdom or expediency of legislation, as well as upon its legality. Conspicuous examples are the Income Tax Case of 1895, in which the Supreme Court, after reversing itself, denied the constitutionality of the income tax; and the Minimum Wage Cases of 1923, in which the majority opinion was severely criticized by Chief Justice Taft, and which was reversed in 1937.<sup>1</sup>

### a. Income Tax Cases

[*Pollock v. Farmers' Loan and Trust Co.* (1895), 157 U. S. 429, 607, 695; 39 L. Ed. 759, 828, 1145-1146.]

Mr. Justice Field's concurring opinion [at first hearing] :

Here I close my opinion. I could not say less in view of questions of such gravity that go down to the very foundation of the government. If the provisions of the Constitution can be set aside by an Act of Congress, where is the course of usurpation to end? The present assault upon capital is but the beginning. It will be but the stepping-stone to others, larger and more sweeping, till our political contests will become a war of the poor against the rich; a war constantly growing in intensity and bitterness. "If the court sanctions the power of discriminating taxation, and nullifies the uniformity mandate of the Constitution," as said by one who has been all his life a student of our institutions, "it will mark the hour when the sure decadence of our present government will commence." If the purely arbitrary limitation of \$4000 in the present law can be sustained, none having less than that amount of income being assessed or taxed for the support of the government, the limitation of future Congresses may be fixed at a much larger sum, at five or ten or twenty thousand dollars, parties possessing an income of that amount alone being bound to bear the burdens of government; or the limitation may be designated at such an amount as a board of "walking delegates" may deem necessary. There is no safety in allowing the limitation to be adjusted except in strict compliance with the mandates of the Constitu-

<sup>1</sup> *West Coast Hotel Co. v. Parrish* (1937), 300 U. S. 379.

tion which require its taxation, if imposed by direct taxes, to be apportioned among the states according to their representation, and if imposed by indirect taxes, to be uniform in operation and, so far as practicable, in proportion to their property, equal upon all citizens. Unless the rule of the Constitution governs, a majority may fix the limitation at such rate as will not include any of their own number.

. . . . .

Mr. Justice Brown dissenting [at second hearing]: . . .

It is difficult to overestimate the importance of these cases. I certainly cannot overstate the regret I feel at the disposition made of them by the court. It is never a light thing to set aside the deliberate will of the legislature, and in my opinion it should never be done, except upon the clearest proof of its conflict with the fundamental law. Respect for the Constitution will not be inspired by a narrow and technical construction which shall limit or impair the necessary powers of Congress. Did the reversal of these cases involve merely the striking down of the inequitable features of this law, or even the whole law, for its want of uniformity, the consequences would be less serious; but as it implies a declaration that every income tax must be laid according to the rule of apportionment, the decision involves nothing less than a surrender of the taxing power to the moneyed class. By resuscitating an argument that was exploded in the *Hylton* case, and has lain practically dormant for a hundred years, it is made to do duty in nullifying, not this law alone, but every similar law that is not based upon an impossible theory of apportionment. Even the spectre of socialism is conjured up to frighten Congress from laying taxes upon the people in proportion to their ability to pay them. It is certainly a strange commentary upon the Constitution of the United States and upon the democratic government that Congress has no power to lay a tax which is one of the main sources of revenue of nearly every civilized state. It is a confession of feebleness in which I find myself wholly unable to join.

While I have no doubt that Congress will find some means of surmounting the present crisis, my fear is that in some moment of national peril this decision will rise up to frustrate its will and paralyze its arm. I hope it may not prove the first step toward the submergence of the liberties of people in a sordid despotism of wealth.

As I cannot escape the conviction that the decision of the court in this great case is fraught with immeasurable danger to the future of the country, and that it approaches the proportion of a national calamity, I feel it my duty to enter my protest against it.

## b. Minimum Wage Cases

[*Adkins v. Children's Hospital* (1923), 261 U. S. 525, 562; 67 L. Ed. 785, 798.]

Mr. Chief Justice Taft, dissenting:

I regret much to differ from the court in these cases.

The boundary of the police power, beyond which its exercise becomes an invasion of the guaranty of liberty under the 5th and 14th Amendments to the Constitution, is not easy to mark. Our court has been laboriously engaged in pricking out a line in successive cases. We must be careful, it seems to me, to follow that line as well as we can, and not to depart from it by suggesting a distinction that is formal rather than real.

Legislatures, in limiting freedom of contract between employee and employer by a minimum wage, proceed on the assumption that employees in the class receiving least pay are not upon a full level of equality of choice with their employer, and in their necessitous circumstances are prone to accept pretty much anything that is offered. They are peculiarly subject to the overreaching of the harsh and greedy employer. The evils of the sweating system and of the long hours and low wages which are characteristic of it are well known. Now, I agree that it is a disputable question in the field of political economy how far a statutory requirement of maximum hours or minimum wages may be a useful remedy for these evils, and whether it may not make the case of the oppressed employee worse than it was before. But it is not the function of this court to hold congressional acts invalid simply because they are passed to carry out economic views which the court believes to be unwise or unsound. . . .

## c. View of President Theodore Roosevelt

[Message to Congress, Dec. 8, 1908. *Foreign Relations of the United States*, 1908, pp. XXVI-XXVII.]

The chief lawmakers in our country may be, and often are, the judges, because they are the final seat of authority. Every time they interpret contract, property, vested rights, due process of law, liberty, they necessarily enact into law parts of a system of social philosophy; and as such interpretation is fundamental, they give direction to all law-making. The decisions of the courts on economic and social questions depend upon

their economic and social philosophy; and for the peaceful progress of our people during the twentieth century we shall owe most to those judges who hold to a twentieth century economic and social philosophy and not to a long outgrown philosophy, which was itself the product of primitive economic conditions. Of course a judge's views on progressive social philosophy are entirely second in importance to his possession of a high and fine character; which means the possession of such elementary virtues as honesty, courage, and fairmindedness. The judge who owes his election to pandering to demagogic sentiments or class hatreds and prejudices, and the judge who owes either his election or his appointment to the money or the favor of a great corporation, are alike unworthy to sit on the bench, are alike traitors to the people; and no profundity of legal learning, or correctness of abstract conviction on questions of public policy, can serve as an offset to such shortcomings. But it is also true that judges, like executives and legislators, should hold sound views on the questions of public policy which are of vital interest to the people.

The legislators and executives are chosen to represent the people in enacting and administering the laws. The judges are not chosen to represent the people in this sense. Their function is to interpret the laws. The legislators are responsible for the laws; the judges for the spirit in which they interpret and enforce the laws. We stand aloof from the reckless agitators who would make the judges mere pliant tools of popular prejudice and passion; and we stand aloof from those equally unwise partisans of reaction and privilege who deny the proposition that, inasmuch as judges are chosen to serve the interests of the whole people, they should strive to find out what those interests are, and, so far as they conscientiously can, should strive to give effect to popular conviction when deliberately and duly expressed by the lawmaking body. The courts are to be highly commended and staunchly upheld when they set their faces against wrongdoing or tyranny by a majority; but they are to be blamed when they fail to recognize under a government like ours the deliberate judgment of the majority as to a matter of legitimate policy, when duly expressed by the legislature. Such lawfully expressed and deliberate judgment should be given effect by the courts, save in the extreme and exceptional cases where there has been a clear violation of a constitutional provision. Anything like frivolity or wantonness in upsetting such clearly taken governmental action is a grave offense against the Republic. To protest against tyranny, to protect minorities from oppression, to nullify an act committed in a spasm of popular fury, is to render a service to the Republic. But for the courts to arrogate to

themselves functions which properly belong to the legislative bodies is all wrong, and in the end works mischief. The people should not be permitted to pardon evil and slipshod legislation on the theory that the court will set it right; they should be taught that the right way to get rid of a bad law is to have the legislature repeal it, and not to have the courts by ingenious hair-splitting nullify it. A law may be unwise and improper; but it should not for these reasons be declared unconstitutional by a strained interpretation, for the result of such action is to take away from the people at large their sense of responsibility and ultimately to destroy their capacity for orderly self restraint and self government. Under such a popular government as ours, founded on the theory that in the long run the will of the people is supreme, the ultimate safety of the Nation can only rest in training and guiding the people so that what they will shall be right, and not in devising means to defeat their will by the technicalities of strained construction.

## 89. PROPOSALS FOR MODIFICATION OF JUDICIAL REVIEW

The extraordinary character of the power vested in the courts through the review of legislation has led many to believe, as a matter of principle, that there should be some limitations imposed. In addition, there has on several occasions been serious dissatisfaction with particular decisions and with the manner in which the power has been exercised. Consequently, proposals have been made from time to time for a limitation or modification of judicial review. Several of these proposals have received serious consideration in Congress, some have passed one house, and in 1868 Congress actually enacted a law depriving the Supreme Court of jurisdiction to hear cases arising under the earlier Reconstruction Act, in order to prevent that act from being declared unconstitutional. Typical of these earlier proposals are the more recent ones by President Theodore Roosevelt and by Senators Borah and LaFollette, which, although they have not been adopted, represent the forms of modification suggested by the various groups who oppose the unlimited exercise of power by the courts.

### a. Recall of Judicial Decisions

[Progressive Party Platform, 1912. Text in Porter, *National Party Platforms* (The Macmillan Company), p. 337.]

### THE COURTS

The Progressive party demands such restriction of the power of the courts as shall leave to the people the ultimate authority to determine fundamental questions of social welfare and public policy. To secure this end, it pledges itself to provide:



1. That when an Act, passed under the police power of the State, is held unconstitutional under the State Constitution, by the courts, the people, after an ample interval for deliberation, shall have an opportunity to vote on the question whether they desire the Act to become law, notwithstanding such decision.

2. That every decision of the highest appellate court of a State declaring an Act of the Legislature unconstitutional on the ground of its violation of the Federal Constitution shall be subject to the same review by the Supreme Court of the United States as is now accorded to decisions sustaining such legislation.

#### b. LaFollette Proposal

[Platform of Progressive Party, 1924. Text in Porter, *National Party Platforms* (The Macmillan Company), p. 519.]

5. We favor submitting to the people, for their considerate judgment, a constitutional amendment providing that Congress may by enacting a statute make it effective over a judicial veto.

We favor such amendment to the constitution as may be necessary to provide for the election of all Federal Judges, without party designation, for fixed terms not exceeding ten years, by direct vote of the people.

#### c. Borah Proposal

[S. 4483, 67 Cong., 4 Sess.; introduced by Senator Borah, Feb. 5, 1923. Text in *Congressional Digest*, vol. II, p. 271.]

A bill providing the number of Judges which shall concur in holding an Act of Congress unconstitutional.

That in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be a party, where is drawn in question an Act of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court shall concur before pronouncing said law unconstitutional.

### 90. JUDICIAL REORGANIZATION

The need for a thorough reorganization of the federal judiciary has long been urged by many persons familiar with the operation of the judicial system, in order to secure better coordination among the various grades of courts, some kind of



central supervision over the work of the entire judiciary, and a clearer recognition of the relation of law to the immediate social and economic problems. On the initiative of Chief Justice Taft, Congress in 1922 provided for an annual Judicial Conference of judges representing the different courts in the system, and useful results have been obtained. In 1937 President Roosevelt made proposals generally considered somewhat drastic, especially with respect to the Supreme Court. After a long and bitter debate, the Administration bill was rejected, but later Congress enacted statutes that essentially carried out the President's recommendations with respect to retirement of judges and administrative supervision of the judicial system; and the accident of death made it possible for the President to make over the Supreme Court in accordance with the purpose of his proposals to Congress.

#### a. Proposal of President Roosevelt

[Message to Congress, Feb. 5, 1937. *Congressional Record*, vol. 81, pt. 1, pp. 877-881.]

##### TO THE CONGRESS OF THE UNITED STATES:

I have recently called the attention of the Congress to the clear need for a comprehensive program to reorganize the administrative machinery of the Executive Branch of our Government. I now make a similar recommendation to the Congress in regard to the Judicial Branch of the Government, in order that it also may function in accord with modern necessities.

The Constitution provides that the President "shall from time to time give to the Congress information of the State of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient." No one else is given a similar mandate. It is therefore the duty of the President to advise the Congress in regard to the Judiciary whenever he deems such information or recommendation necessary.

I address you for the further reason that the Constitution vests in the Congress direct responsibility in the creation of courts and judicial offices and in the formulation of rules of practice and procedure. It is, therefore, one of the definite duties of the Congress constantly to maintain the effective functioning of the Federal Judiciary.

The Judiciary has often found itself handicapped by insufficient personnel with which to meet a growing and more complex business. It is true that the physical facilities of conducting the business of the courts have been greatly improved, in recent years, through the erection of suitable quarters, the provision of adequate libraries and the addition of subordinate court officers. But in many ways these are merely the trappings of judicial office. They play a minor part in the processes of justice.

Since the earliest days of the Republic, the problem of the personnel of the courts has needed the attention of the Congress. For example, from the beginning, over repeated protests to President Washington, the Justices of the Supreme Court were required to "ride circuit" and, as Circuit Justices, to hold trials throughout the length and breadth of the land—a practice which endured over a century.

In almost every decade since 1789, changes have been made by the Congress whereby the numbers of judges and the duties of judges in federal courts have been altered in one way or another. The Supreme Court was established with six members of 1789; it was reduced to five in 1801; it was increased to seven in 1807; it was increased to nine in 1837; it was increased to ten in 1863; it was reduced to seven in 1866; it was increased to nine in 1869.

The simple fact is that today a new need for legislative action arises because the personnel of the Federal Judiciary is insufficient to meet the business before them. A growing body of our citizens complain of the complexities, the delays, and the expense of litigation in United States Courts.

A letter from the Attorney General, which I submit herewith,<sup>1</sup> justifies by reasoning and statistics the common impression created by our overcrowded federal dockets—and it proves the need for additional judges.

Delay in any court results in injustice.

It makes lawsuits a luxury available only to the few who can afford them or who have property interests to protect which are sufficiently large to repay the cost. Poorer litigants are compelled to abandon valuable rights or to accept inadequate or unjust settlements because of sheer inability to finance or to await the end of a long litigation. Only by speeding up the processes of the law and thereby reducing their cost, can we eradicate the growing impression that the courts are chiefly a haven for the well-to-do.

Delays in the determination of appeals have the same effect. Moreover, if trials of original actions are expedited and existing accumulations of cases are reduced, the volume of work imposed on the Circuit Courts of Appeals will further increase.

The attainment of speedier justice in the courts below will enlarge the task of the Supreme Court itself. And still more work would be added by the recommendation which I make later in this message for the quicker determination of constitutional questions by the highest court.

<sup>1</sup> This letter and the accompanying statistical tables are omitted here, but may be found in *Congressional Record*, vol. 81, pt. 1, pp. 879-880 (Feb. 5, 1937).

Even at the present time the Supreme Court is laboring under a heavy burden. Its difficulties in this respect were superficially lightened some years ago by authorizing the court, in its discretion, to refuse to hear appeals in many classes of cases. This discretion was so freely exercised that in the last fiscal year, although 867 petitions for review were presented to the Supreme Court, it declined to hear 717 cases. If petitions in behalf of the Government are excluded, it appears that the court permitted private litigants to prosecute appeals in only 108 cases out of 803 applications. Many of the refusals were doubtless warranted. But can it be said that full justice is achieved when a court is forced by the sheer necessity of keeping up with its business to decline, without even an explanation, to hear 87% of the cases presented to it by private litigants?

It seems clear, therefore, that the necessity of relieving present congestion extends to the enlargement of the capacity of all the federal courts.

A part of the problem of obtaining a sufficient number of judges to dispose of cases is the capacity of the judges themselves. This brings forward the question of aged or infirm judges—a subject of delicacy and yet one which requires frank discussion.

In the federal courts there are in all 237 life tenure permanent judgeships. Twenty-five of them are now held by judges over seventy years of age and eligible to leave the bench on full pay. Originally no pension or retirement allowance was provided by the Congress. When after eighty years of our national history the Congress made provision for pensions, it found a well-entrenched tradition among judges to cling to their posts, in many instances far beyond their years of physical or mental capacity. Their salaries were small. As with other men, responsibilities and obligations accumulated. No alternative had been open to them except to attempt to perform the duties of their offices to the very edge of the grave.

In exceptional cases, of course, judges, like other men, retain to an advanced age full mental and physical vigor. Those not so fortunate are often unable to perceive their own infirmities. "They seem to be tenacious of the appearance of adequacy." The voluntary retirement law of 1869 provided, therefore, only a partial solution. That law, still in force, has not proved effective in inducing aged judges to retire on a pension.

This result had been foreseen in the debates when the measure was being considered. It was then proposed that when a judge refused to retire upon reaching the age of seventy, an additional judge should be

appointed to assist in the work of the court. The proposal passed the House but was eliminated in the Senate.

With the opening of the twentieth century, and the great increase of population and commerce, and the growth of a more complex type of litigation, similar proposals were introduced in the Congress. To meet the situation, in 1913, 1914, 1915 and 1916, the Attorneys General then in office recommended to the Congress that when a district or a circuit judge failed to retire at the age of seventy, an additional judge be appointed in order that the affairs of the court might be promptly and adequately discharged.

In 1919 a law was finally passed providing that the President "may" appoint additional district and circuit judges, but only upon a finding that the incumbent judge over seventy "is unable to discharge efficiently all the duties of his office by reason of mental or physical disability of permanent character." The discretionary and indefinite nature of this legislation has rendered it ineffective. No President should be asked to determine the ability or disability of any particular judge.

The duty of a judge involves more than presiding or listening to testimony or arguments. It is well to remember that the mass of details involved in the average of law cases today is vastly greater and more complicated than even twenty years ago. Records and briefs must be read; statutes, decisions, and extensive material of a technical, scientific, statistical and economic nature must be searched and studied; opinions must be formulated and written. The modern tasks of judges call for the use of full energies.

Modern complexities call also for a constant infusion of new blood in the courts, just as it is needed in executive functions of the Government and in private business. A lowered mental or physical vigor leads men to avoid an examination of complicated and changed conditions. Little by little, new facts become blurred through old glasses fitted, as it were, for the needs of another generation; older men, assuming that the scene is the same as it was in the past, cease to explore or inquire into the present or the future.

We have recognized this truth in the civil service of the nation and of many states by compelling retirement on pay at the age of seventy. We have recognized it in the Army and Navy by retiring officers at the age of sixty-four. A number of states have recognized it by providing in their constitutions for compulsory retirement of aged judges.

Life tenure of judges, assured by the Constitution, was designed to place the courts beyond temptations or influences which might impair their judgments; it was not intended to create a static judiciary. A

constant and systematic addition of younger blood will vitalize the courts and better equip them to recognize and apply the essential concepts of justice in the light of the needs and the facts of an ever-changing world.

It is obvious, therefore, from both reason and experience, that some provision must be adopted, which will operate automatically to supplement the work of older judges and accelerate the work of the court.

I, therefore, earnestly recommend that the necessity of an increase in the number of judges be supplied by legislation providing for the appointment of additional judges in all federal courts, without exception, where there are incumbent judges of retirement age who do not choose to retire or to resign. If an elder judge is not in fact incapacitated, only good can come from the presence of an additional judge in the crowded state of the dockets; if the capacity of an elder judge is in fact impaired, the appointment of an additional judge is indispensable. This seems to be a truth which cannot be contradicted.

I also recommend that the Congress provide machinery for taking care of sudden or long-standing congestion in the lower courts. The Supreme Court should be given power to appoint an administrative assistant who may be called a Proctor. He would be charged with the duty of watching the calendars and the business of all the courts in the federal system. The Chief Justice thereupon should be authorized to make a temporary assignment of any circuit or district judge hereafter appointed in order that he may serve as long as needed in any circuit or district where the courts are in arrears.

I attach a carefully considered draft of a proposed bill,<sup>2</sup> which, if enacted, would, I am confident, afford substantial relief. The proposed measure also contains a limit on the total number of judges who might thus be appointed and also a limit on the potential size of any one of our federal courts.

These proposals do not raise any issue of constitutional law. They do not suggest any form of compulsory retirement for incumbent judges. Indeed, those who have reached the retirement age, but desire to continue their judicial work, would be able to do so under less physical and mental strain and would be able to play a useful part in relieving the growing congestion in the business of our courts. Among them are men of eminence and great ability whose services the Government would be loath to lose. If, on the other hand, any judge eligible for retirement should feel that his court would suffer because of an increase in its

<sup>2</sup> This draft bill is omitted here, but may be found in *Congressional Record*, vol. 81, pt. 1, pp. 880-881 (Feb. 5, 1937).



membership, he may retire or resign under already existing provisions of law if he wishes so to do. In this connection let me say that the pending proposal to extend to the Justices of the Supreme Court the same retirement privileges now available to other federal judges, has my entire approval.

One further matter requires immediate attention. We have witnessed the spectacle of conflicting decisions in both trial and appellate courts on the constitutionality of every form of important legislation. Such a welter of uncomposed differences of judicial opinion has brought the law, the courts, and, indeed, the entire administration of justice dangerously near to disrepute.

A federal statute is held legal by one judge in one district; it is simultaneously held illegal by another judge in another district. An act valid in one judicial circuit is invalid in another judicial circuit. Thus rights fully accorded to one group of citizens may be denied to others. As a practical matter this means that for periods running as long as one year or two years or three years—until final determination can be made by the Supreme Court—the law loses its most indispensable element—equality.

Moreover, during the long processes of preliminary motions, original trials, petitions for rehearings, appeals, reversals on technical grounds requiring re-trials, motions before the Supreme Court and the final hearing by the highest tribunal—during all this time labor, industry, agriculture, commerce and the Government itself go through an unconscionable period of uncertainty and embarrassment. And it is well to remember that during these long processes the normal operations of society and government are handicapped in many cases by differing and divided opinions in the lower courts and by the lack of any clear guide for the dispatch of business. Thereby our legal system is fast losing another essential of justice—certainty.

Finally, we find the processes of government itself brought to a complete stop from time to time by injunctions issued almost automatically, sometimes even without notice to the Government, and not infrequently in clear violation of the principle of equity that injunctions should be granted only in those rare cases of manifest illegality and irreparable damage against which the ordinary course of the law offers no protection. Statutes which the Congress enacts are set aside or suspended for long periods of time, even in cases to which the Government is not a party.

In the uncertain state of the law, it is not difficult for the ingenious to devise novel reasons for attacking the validity of new legislation or



its application. While these questions are laboriously brought to issue and debated through a series of courts, the Government must stand aside. It matters not that the Congress has enacted the law, that the Executive has signed it and that the administrative machinery is waiting to function. Government by injunction lays a heavy hand upon normal processes; and no important statute can take effect—against any individual or organization with the means to employ lawyers and engage in wide-flung litigation—until it has passed through the whole hierarchy of the courts. Thus the judiciary, by postponing the effective date of Acts of the Congress, is assuming an additional function and is coming more and more to constitute a scattered, loosely organized and slowly operating third house of the National Legislature.

This state of affairs has come upon the nation gradually over a period of decades. In my annual message to this Congress I expressed some views and some hopes.

Now, as an immediate step, I recommend that the Congress provide that no decision, injunction, judgment or decree on any constitutional question be promulgated by any federal court without previous and ample notice to the Attorney General and an opportunity for the United States to present evidence and be heard. This is to prevent court action on the constitutionality of Acts of the Congress in suits between private individuals, where the Government is not a party to the suit, without giving opportunity to the Government of the United States to defend the law of the land.

I also earnestly recommend that in cases in which any court of first instance determines a question of constitutionality, the Congress provide that there shall be a direct and immediate appeal to the Supreme Court, and that such cases take precedence over all other matters pending in that court. Such legislation will, I am convinced, go far to alleviate the inequality, uncertainty and delay in the disposition of vital questions of constitutionality arising under our fundamental law.

My desire is to strengthen the administration of justice and to make it a more effective servant of public need. In the American ideal of government the courts find an essential and constitutional place. In striving to fulfill that ideal, not only the judges but the Congress and the Executive as well, must do all in their power to bring the judicial organization and personnel to the high standards of usefulness which sound and efficient government and modern conditions require.

This message has dealt with four present needs:

First, to eliminate congestion of calendars and to make the judiciary as a whole less static by the constant and systematic addition of new

blood to its personnel; second, to make the judiciary more elastic by providing for temporary transfers of circuit and district judges to those places where federal courts are most in arrears; third, to furnish the Supreme Court practical assistance in supervising the conduct of business in the lower courts; fourth, to eliminate inequality, uncertainty and delay now existing in the determination of constitutional questions involving federal statutes.

If we increase the personnel of the federal courts so that cases may be promptly decided in the first instance, and may be given adequate and prompt hearing on all appeals; if we invigorate all the courts by the persistent infusion of new blood; if we grant to the Supreme Court further power and responsibility in maintaining the efficiency of the entire federal judiciary; and if we assure government participation in the speedier consideration and final determination of all constitutional questions, we shall go a long way toward our high objectives. If these measures achieve their aim, we may be relieved of the necessity of considering any fundamental changes in the powers of the courts or the constitution of our Government—changes which involve consequences so far-reaching as to cause uncertainty as to the wisdom of such course.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE,  
February 5, 1937.

#### b. View of Chief Justice Hughes

[Letter of Chief Justice Hughes to Senator Burton K. Wheeler (Mont.), Mar. 21, 1937. Text in *Congressional Record*, vol. 81, pt. 3, pp. 2813-2815 (Mar. 29, 1937).]

My Dear Senator Wheeler:

In response to your inquiries, I have the honor to present the following statement with respect to the work of the Supreme Court:

1. The Supreme Court is fully abreast of its work. When we rose on March 15 (for the present recess) we had heard argument in cases in which certiorari had been granted only four weeks before, Feb. 15.

During the current term, which began last October and which we call October Term, 1936, we have heard argument on the merits in 150 cases (180 numbers) and we have 28 cases (30 numbers) awaiting argument. We shall be able to hear all these cases, and such others as may come up for argument, before our adjournment for the term. There is no congestion of cases upon our calendar.

This gratifying condition has obtained for several years. We have been able for several terms to adjourn after disposing of all cases which are ready to be heard.

2. The cases on our docket are classified as original and appellate. Our original jurisdiction is defined by the Constitution and embraces cases to which States are parties. There are not many of these. At the present time they number thirteen and are in various stages of progress to submission for determination.

Our appellate jurisdiction covers those cases in which appeal is allowed by statute as a matter of right and cases which come up to us on writs of certiorari.

The following is a comparative statement of the cases on the dockets for the six terms preceding the current term:

#### FOR TERMS 1930-32

	1930	1931	1932
Total cases on dockets .....	1,039	1,023	1,037
Disposed of during term .....	900	884	910
Cases remaining on dockets .....	139	139	127

#### DISTRIBUTION OF CASES

##### *Cases Disposed of*

Original cases .....	8	1	4
Appellate—on merits .....	326	282	257
Petitions for certiorari .....	566	601	649

##### *Remaining on Dockets*

Original cases .....	16	19	17
Appellate—on merits .....	76	60	56
Petitions for certiorari .....	47	60	54

#### FOR TERMS 1933-35

	1933	1934	1935
Total cases on dockets .....	1,132	1,040	1,094
Disposed of during term .....	1,029	931	990
Cases remaining on dockets .....	103	109	102

#### DISTRIBUTION OF CASES

##### *Cases Disposed of*

Original cases .....	4	5	4
Appellate—on merits .....	293	256	269
Petitions for certiorari .....	732	670	717

##### *Remaining on Dockets*

Original cases .....	15	13	12
Appellate—on merits .....	43	51	56
Petitions for certiorari .....	45	45	34

Further statistics for these terms, and those for earlier terms are available if you desire them.

During the present term we have thus far disposed of 666 cases which include petitions for certiorari and cases which have been argued on the merits and already decided.

3. The statute relating to our Appellate jurisdiction is the act of Feb. 13, 1925; 43 stat. 936. That act limits to certain cases the appeals which come to the Supreme Court as a matter of right. Review in other cases is made to depend upon the allowance by the Supreme Court of a writ of certiorari.

Where the appeal purports to lie as a matter of right, the rules of the Supreme Court (Rule 12) require the appellant to submit a jurisdictional statement showing that the case falls within that class of appeals and that a substantial question is involved. We examine that statement and the supporting and opposing briefs, and decide whether the court has jurisdiction. As a result, many frivolous appeals are forthwith dismissed and the way is open for appeals which disclose substantial questions.

4. The act of 1925, limiting appeals as a matter of right and enlarging the provisions for review only through certiorari, was most carefully considered by Congress. I call attention to the reports of the Judiciary Committees of the Senate and House of Representatives, 68th Cong., 1st Sess. That legislation was deemed to be essential to enable the Supreme Court to perform its proper function. No single court of last resort, whatever the number of judges, could dispose of all the cases which arise in this vast country and which litigants would seek to bring up if the right of appeal were unrestricted.

Hosts of litigants will take appeals so long as there is a tribunal accessible. In protracted litigation, the advantage is with those who command a long purse. Unmeritorious appeals cause intolerable delays. Such appeals clog the calendar and get in the way of those that have merit.

Under our Federal system, when litigants have had their cases heard in the court of first instance, and the trier of the facts, jury or judge as the case may require, has spoken and the case on the facts and law has been decided, and when the dissatisfied party has been accorded an appeal to the Circuit Court of Appeals, the litigants, so far as mere private interests are concerned, have had their day in court.

If further review is to be had by the Supreme Court it must be because of the public interest in the questions involved. That review, for example, should be for the purpose of resolving conflicts in judicial decisions between different Circuit Courts of Appeals or between Circuit Courts of Appeals and State courts where the question is one of State law; or for the purpose of determining constitutional questions or set-

tlng the interpretation of statutes ; or because of the importance of the questions of law that are involved. Review by the Supreme Court is thus in the interest of the law, its appropriate exposition and enforcement, not in the mere interest of the litigants.

It is obvious that if appeal as a matter of right is restricted to certain described cases, the question whether review should be allowed in other cases must necessarily be confined to some tribunal for determination, and of course, with respect to review by the Supreme Court, that court should decide.

5. Granting certiorari is not a matter of favor but of sound judicial discretion. It is not the importance of the parties or the amount of money involved that is in any sense controlling. The action of the court is governed by its rules from which I quote the following (Rule 38, Par. 5) :

"5. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's discretion, indicate the character of reasons which will be considered :

(A) Where a State court has decided a Federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

(B) Where a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Circuit Court of Appeals on the same matter ; or has decided an important question of local law in a way probably in conflict with applicable local decisions ; or has decided an important question of general law in a way probably untenable or in conflict with the weight of authority ; or has decided an important question of Federal law which has not been, but should be, settled by this court ; or has decided a Federal question in a way probably in conflict with applicable decisions of this court ; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this court's power of supervision.

(C) Where the United States Court of Appeals for the District of Columbia has decided a question of general importance, or a question of substance relating to the construction or application of the Constitution, or a treaty or statute of the United States, which has not been, but should be, settled by this court ; or where that court has not given proper effect to an applicable decision of this court."

These rules are impartially applied, as it is most important that they should be.

I should add that petitions for certiorari are not apportioned among the justices. In all matters before the court, except in the mere routine of administration, all the justices—unless for some reason a justice is disqualified or unable to act in a particular case—participate in the decision. This applies to the grant or refusal of petitions for certiorari.

Furthermore, petitions for certiorari are granted if four justices think that they should be. A vote by a majority is not required in such cases. Even if two or three of the justices are strongly of the opinion that certiorari should be allowed, frequently the other justices will acquiesce in their view but the petition is always granted if four so vote.

6. The work of passing upon these applications for certiorari is laborious but the court is able to perform it adequately. Observations have been made as to the vast number of pages of records and briefs that are submitted in the course of a term. The total is imposing but the suggested conclusion is hasty and rests on an illusory basis.

Records are replete with testimony and evidence of facts. But the questions on certiorari are questions of law. So many cases turn on the facts, principles of law not being in controversy. It is only when the facts are so interwoven with the questions of law which we should review that the evidence must be examined and then only to the extent that it is necessary to decide the questions of law.

This at once disposes of a vast number of factual controversies where the parties have been fully heard in the courts below and have no right to burden the Supreme Court with the dispute which interests no one but themselves. This is also true of controversies over contracts and documents of all sorts which involve only questions of concern to the immediate parties.

The applicant for certiorari is required to state in his petition the grounds for his application and in a host of cases that disclosure itself disposes of his request. So that the number of pages of records and briefs afford no satisfactory criterion of the actual work involved. It must also be remembered that justices who have been dealing with such matters for years have the aid of a long and varied experience in separating the chaff from the wheat.

I think that it is safe to say that about 60 per cent of the applications for certiorari are wholly without merit and ought never to have been made. There are probably about 20 per cent or so in addition which have a fair degree of plausibility but which fail to survive critical examination. The remainder, falling short, I believe, of 20 per cent, show



substantial grounds and are granted. I think that it is the view of the members of the court that if any error is made in dealing with these applications it is on the side of liberality.

An increase in the number of justices of the Supreme Court, apart from any question of policy, which I do not discuss, would not promote the efficiency of the court. It is believed that it would impair that efficiency so long as the court acts as a unit. There would be more judges to hear, more judges to confer, more judges to discuss, more judges to be convinced and to decide.

The present number of justices is thought to be large enough so far as the prompt, adequate and efficient conduct of the work of the court is concerned. As I have said, I do not speak of any other considerations in view of the appropriate attitude of the court in relation to questions of policy.

I understand that it has been suggested that with more justices the court could hear cases in divisions. It is believed that such a plan would be impracticable. A large proportion of the cases we hear are important and a decision by a part of the court would be unsatisfactory.

I may also call attention to the provision of Article III, Section 1, of the Constitution that the judicial power of the United States shall be vested "in one Supreme Court" and in such inferior courts as the Congress may from time to time ordain and establish. The Constitution does not appear to authorize two or more Supreme Courts or two or more parts of a Supreme Court functioning in effect as separate courts.

On account of the shortness of time I have not been able to consult with the members of the court generally with respect to the foregoing statement, but I am confident that it is in accord with the views of the justices. I should say, however, that I have been able to consult with Mr. Justice Van Devanter and Mr. Justice Brandeis, and I am at liberty to say that the statement is approved by them.

I have the honor to remain, respectfully yours,

(Signed) CHARLES E. HUGHES,  
*Chief Justice of the United States.*

## CHAPTER XV

### TAXATION AND FINANCE

#### 91. POWER TO TAX GOVERNMENTAL INSTRUMENTALITIES

In the famous case of *McCulloch v. Maryland*, Chief Justice Marshall laid down the principle that "the power to tax is the power to destroy." From that and the indestructible character of the Union, he drew the implication that states had no power to tax federal agencies or instrumentalities—in that case the notes of the United States Bank. The converse doctrine that the federal government similarly lacks the power to tax instrumentalities of a state was not positively asserted by the courts until 1870, but was since that time maintained, even in the face of the language of the 16th Amendment, until 1939. The result of that doctrine was a tremendous increase of investments in state and municipal bonds, these being free from the federal income tax, hence an amendment to the Constitution was proposed in 1922 by the House Ways and Means Committee and approved by President Harding, specifically giving such power of taxation. This proposed amendment passed the House in January, 1923 (223-101), but was not even brought to a vote in the Senate, and was never submitted to the states. Nevertheless, agitation for a change continued throughout the years, and in 1939 the Supreme Court, after a series of decisions materially modifying the actual application of immunity from taxation,<sup>1</sup> reversed its historic position and held the doctrine of governmental immunity from indirect tax burden no longer generally sound. It was not at once made entirely clear, however, what were the full implications of this reversal with respect to the taxing power.

##### a. Proposal of President Roosevelt

[Message to Congress, Apr. 25, 1938.<sup>2</sup> *Congressional Record*, vol. 83, pt. 5, p. 5683.]

##### TO THE CONGRESS OF THE UNITED STATES:

The Sixteenth Amendment to the Constitution of the United States, approved in 1913, expressly authorized the Congress "to lay and collect

<sup>1</sup> Especially the following: *Board of Trustees of the University of Illinois v. United States* (1933), 289 U. S. 48, 77 L. Ed. 1025; *James v. Draco Contracting Co.* (1937), 302 U. S. 134, 82 L. Ed. 155 (West Virginia Contract Case); *Silas Mason Co. v. Tax Commission of the State of Washington* (1937), 302 U. S. 186, 82 L. Ed. 187 (Coulee Dam Case); *Helvering v. Gerhardt* (1938), 304 U. S. 405, 82 L. Ed. 1427 (Port of New York Authority Case); *Allen v. Regents of the University System of Georgia* (1938), 304 U. S. 439, 82 L. Ed. 1448 (University of Georgia Football Case).

<sup>2</sup> See also Message to Congress, Jan. 19, 1939. *Congressional Record*, vol. 84, pt. 1, pp. 467-468.

taxes on incomes, from whatever source derived." That is plain language. Fairly construed this language would seem to authorize taxation of income derived from state and municipal, as well as federal bonds, and also income derived from state and municipal as well as federal offices.

This seemingly obvious construction of the Sixteenth Amendment, however, was not followed in judicial decisions by the courts. Instead a policy of reciprocal tax immunity was read into the Sixteenth Amendment. This resulted in exempting the income from federal bonds from state taxation and exempting the income from State bonds from federal taxation.

Whatever advantages this reciprocal immunity may have had in the early days of this nation have long ago disappeared. Today it has created a vast reservoir of tax exempt securities in the hands of the very persons who equitably should not be relieved of taxes on their income. This reservoir now constitutes a serious menace to the fiscal systems of both the states and the nation because for years both the federal government and the states have come to rely increasingly upon graduated income taxes for their revenues.

Both the states and the nation are deprived of revenues which could be raised from those best able to supply them. Neither the federal government nor the states receive any adequate, compensating advantage for the reciprocal tax-immunity accorded to income derived from their respective obligations and offices.

A similar problem is created by the exemption from state or federal taxation of a great army of state and federal officers and employees. The number of persons on the pay rolls of both state and federal governments has increased in recent years. Tax exemptions claimed by such officers and employees—once an inequity of relatively slight importance—has become a most serious defect in the fiscal systems of the States and the nation, for they rely increasingly upon graduated income taxes for their revenues.

It is difficult to defend today the continuation of either of these rapidly expanding areas of tax exemption. Fundamentally our tax laws are intended to apply to all citizens equally. That does not mean that the same rate of income tax should apply to the very rich man and to the very poor man. Long ago the United States, through the Congress, accepted the principle that citizens should pay in accordance with their ability to pay, and that identical tax rates on the rich and on the poor actually worked an injustice to the poor. Hence the origin of progres-

sive surtaxes on personal income as the individual personal income increases.

Tax exemptions through the ownership of government securities of many kinds—federal, state and local—have operated against the fair or effective collection of progressive surtaxes. Indeed, I think it is fair to say that these exemptions have violated the spirit of the tax law itself by actually giving a greater advantage to those with large incomes than to those with small incomes.

Men with great means best able to assume business risks have been encouraged to lock up substantial portions of their funds in tax-exempt securities. Men with little means who should be encouraged to hold the secure obligations of the federal and state governments have been obliged to pay a relatively higher price for those securities than the very rich because the tax-immunity is of much less value to them than to those whose incomes fall in the higher brackets.

For more than twenty years Secretaries of the Treasury have reported to the Congress the growing evils of these tax exemptions. Economists generally have regarded them as wholly inconsistent with any rational system of progressive taxation.

Therefore, I lay before the Congress the statement that a fair and effective progressive income tax and a huge perpetual reserve of tax-exempt bonds cannot exist side by side.

The desirability of this recommendation has been apparent for some time but heretofore it has been assumed that the Congress was obliged to wait upon that cumbersome and uncertain remedy—a constitutional amendment—before taking action. Today, however, expressions in recent judicial opinions lead us to hope that the assumptions underlying these doctrines are being questioned by the court itself and that these tax immunities are not inexorable requirements under the Constitution itself but are the result of judicial decision. Therefore, it is not unreasonable to hope that judicial decision may find it possible to correct it. The doctrine was originally evolved out of a totally different set of economic circumstances from those which now exist. It is a familiar principle of law that decisions lose their binding force when the reasons supporting them no longer are pertinent.

I, therefore, recommend to the Congress that effective action be promptly taken to terminate these tax-exemptions for the future. The legislation should confer the same powers on the states with respect to the taxation of federal bonds hereafter issued as is granted to the federal government with respect to state and municipal bonds hereafter issued.

The same principles of just taxation apply to tax exemptions of official salaries. The federal government does not now levy income taxes on the hundreds of thousands of state, county and municipal employees. Nor do the states, under existing decisions, levy income taxes on the salaries of the hundreds of thousands of federal employees. Justice in a great democracy should treat those who earn their livelihood from government in the same way as it treats those who earn their livelihood in private employ.

I recommend, therefore, that the Congress enact legislation ending tax exemption on government salaries of all kinds, conferring powers on the states with respect to federal salaries and powers to the federal government with respect to state and local government salaries.

Such legislation can, I believe, be enacted by a short and simple statute. It would subject all future state and local bonds to existing federal taxes; and it would confer similar powers on states in relation to future federal issues.

At the same time, such a statute would subject state and local employees to existing federal income taxes; and confer on the states the equivalent power to tax the salaries of federal employees.

The ending of tax exemption, be it of government securities or of government salaries, is a matter, not of politics, but of principle.

FRANKLIN D. ROOSEVELT

THE WHITE HOUSE, *April 25, 1938*

### **b. Decision of Supreme Court**

[*Graves v. New York ex rel. O'Keefe* (1939), 306 U. S. 466-493.]

Mr. Justice Stone delivered the opinion of the Court.

We are asked to decide whether the imposition by the State of New York of an income tax on the salary of an employee of the Home Owners' Loan Corporation places an unconstitutional burden upon the Federal Government.

Respondent, a resident of New York, was employed during 1934 as an examining attorney for the Home Owners' Loan Corporation at an annual salary of \$2,400. In his income tax return for that year he included his salary as subject to the New York State income tax imposed by article 16 of the Tax Law of New York (Consol. Laws, c. 60). Subdivision 2f of section 359, since repealed, exempted from the tax "Salaries, wages, and other compensation received from the United States of officials or employees thereof, including persons in the military or naval forces of the United States \* \* \*." Petitioners, New York

State Tax Commissioners, rejected respondent's claim for a refund of the tax based on the ground that his salary was constitutionally exempt from State taxation because the Home Owners' Loan Corporation is an instrumentality of the United States Government and that he, during the taxable year, was an employee of the Federal Government engaged in the performance of a governmental function.

On review by certiorari the Board's action was set aside by the Appellate Division of the Supreme Court of New York (253 App. Div. 91), whose order was affirmed by the court of appeals (278 N. Y. 221). Both courts held respondent's salary was free from tax on the authority of *New York ex rel. Rogers v. Graves* (299 U. S. 401), which sustained the claim that New York could not constitutionally tax the salary of an employee of the Panama Railroad Co., a wholly owned corporate instrumentality of the United States. We granted certiorari December 19, 1938, the constitutional question presented by the record being of public importance.

The Home Owners' Loan Corporation was created pursuant to section 4 (a) of the Home Owners' Loan Act of 1933 (48 Stat. 128; 12 U. S. C., sec. 1461 et seq.), which was enacted to provide emergency relief to home owners, particularly to assist them with respect to home-mortgage indebtedness. The Corporation, which is authorized to lend money to home owners on mortgages and to refinance home-mortgage loans within the purview of the act, is declared by section 4 (a) to be an instrumentality of the United States. Its shares of stock are wholly Government-owned (sec. 4 (b)). Its funds are deposited in the Treasury of the United States and the compensation of its employees is paid by drafts upon the Treasury.

For the purposes of this case we may assume that the creation of the Home Owners' Loan Corporation was a constitutional exercise of the powers of the Federal Government. (Cf. *Kay v. United States*, 303 U. S. 1.) As that Government derives its authority wholly from powers delegated to it by the Constitution, its every action within its constitutional power is governmental action, and since Congress is made the sole judge of what powers within the constitutional grant are to be exercised, all activities of government constitutionally authorized by Congress must stand on a parity with respect to their constitutional immunity from taxation (*McCulloch v. Maryland*, 4 Wheat. 316, 432; *Van Brocklin v. Tennessee*, 117 U. S. 151, 158-159; *South Carolina v. United States*, 199 U. S. 437, 451-452; *Helvering v. Gerhardt*, 304 U. S. 405, 412-415). And when the National Government lawfully acts through a corporation which it owns and controls those activities are governmental



functions entitled to whatever tax immunity attaches to those functions when carried on by the Government itself through its departments. (See *McCulloch v. Maryland*, supra, 421-422; *Smith v. Kansas City Title Co.*, 255 U. S. 180, 208; *Federal Land Bank v. Crosland*, 261 U. S. 374; *New York ex rel. Rogers v. Graves*, supra.

The single question with which we are now concerned is whether the tax laid by the State upon the salary of respondent, employed by a corporate instrumentality of the Federal Government, imposes an unconstitutional burden upon that Government. The theory of the tax immunity of either Government, State or National, and its instrumentalities, from taxation by the other has been rested upon an implied limitation on the taxing power of each, such as to forestall undue interference, through the exercise of that power, with the governmental activities of the other. That the two types of immunity may not in all respects stand on a parity has been recognized from the beginning (*McCulloch v. Maryland*, supra, 435-436), and possible differences in application, deriving from differences in the source, nature, and extent of the immunity of the governments and their agencies, were pointed out and discussed by this court in detail during the last term (*Helvering v. Gerhardt*, supra, 412-413, 416).

So far as now relevant, those differences have been thought to be traceable to the fact that the Federal Government is one of delegated powers in the exercise of which Congress is supreme; so that every agency which Congress can constitutionally create is a governmental agency. And since the power to create the agency includes the implied power to do whatever is needful or appropriate, if not expressly prohibited, to protect the agency, there has been attributed to Congress some scope, the limits of which it is not now necessary to define, for granting or withholding immunity of Federal agencies from State taxation. (See *Van Allen v. The Assessors*, 3 Wall. 573, 583, 585; *Bank v. Supervisors*, 7 Wall. 26, 30, 31; *Thomson v. Pacific Railroad*, 9 Wall. 579, 588, 590; *People v. Weaver*, 100 U. S. 539, 543; *Mercantile Bank v. New York*, 121 U. S. 138, 154; *Owensboro National Bank v. Owensboro*, 173 U. S. 664, 668; *Shaw v. Gibson-Zahniser Oil Corp.*, 276 U. S. 575, 581; *Oklahoma v. Barnsdall Corp.*, 296 U. S. 521, 525-526; *Baltimore National Bank v. State Tax Comm'n*, 297 U. S. 209, 211-212; *British-American Company v. Board*, 299 U. S. 159; *James v. Dravo Contracting Co.*, 302 U. S. 134, 161; *Helvering v. Gerhardt*, supra, 411, 412, 417; cf. *United States v. Bekins*, 304 U. S. 27, 52.) Whether its power to grant tax exemptions as an incident to the exercise of powers specifically granted by the Constitution can ever, in any circumstances,

extend beyond the constitutional immunity of Federal agencies which courts have implied, is a question which need not now be determined.

Congress has declared in section 4 of the act that the Home Owners' Loan Corporation is an instrumentality of the United States and that its bonds are exempt, as to principal and interest, from Federal and State taxation, except surtaxes, estate, inheritance, and gift taxes. The Corporation itself, "including its franchise, its capital, reserves and surplus, and its loans and income," is likewise exempted from taxation; its real property is subject to tax to the same extent as other real property. But Congress has given no intimation of any purpose either to grant or withhold immunity from State taxation of the salary of the Corporation's employees, and the congressional intention is not to be gathered from the statute by implication. Cf. *Baltimore National Bank v. State Tax Commission*, *supra*.

It is true that the silence of Congress, when it has authority to speak, may sometimes give rise to an implication as to the congressional purpose. The nature and extent of that implication depend upon the nature of the congressional power and the effect of its exercise.<sup>3</sup> But there is little scope for the application of that doctrine to the tax immunity of governmental instrumentalities. The constitutional immunity of either government from taxation by the other, where Congress is silent, has its source in an implied restriction upon the powers of the taxing government. So far as the implication rests upon the purpose to avoid interference with the functions of the taxed government or the imposition upon it of the economic burden of the tax, it is plain that there is no basis for implying a purpose of Congress to exempt the Federal Government or its agencies from tax burdens which are unsubstantial or which courts are unable to discern. Silence of Congress implies immunity no more than does the silence of the Constitution. It follows that when exemption from State taxation is claimed on the ground that the Federal Government is burdened by the tax, and Congress has disclosed no in-

<sup>3</sup> The failure of Congress to regulate interstate commerce has generally been taken to signify a congressional purpose to leave undisturbed the authority of the States to make regulations affecting the commerce in matters of peculiarly local concern, but to withhold from them authority to make regulations affecting those phases of it which, because of the need of a national uniformity, demand that their regulation, if any, be prescribed by a single authority. (*Cooley v. Board of Wardens*, 12 How. 299, 319; *Minnesota Rate Cases*, 230 U. S. 352, 399-400; *Kelly v. Washington*, 302 U. S. 1, 14; *South Carolina State Highway Dept. v. Barnwell Brothers*, 303 U. S. 177, 184-185; *Milk Control Board v. Eisenberg Farm Products*, decided February 27, 1939. As to the implications from congressional silence in the field of State taxation of interstate commerce and its instrumentalities, see *Western Live Stock v. Bureau of Revenue*, 303 U. S. 250; *Gwin, White & Prince, Inc., v. Henneford*, decided January 3, 1939.)

tention with respect to the claimed immunity, it is in order to consider the nature and effect of the alleged burden, and if it appears that there is no ground for implying a constitutional immunity, there is equally a want of any ground for assuming any purpose on the part of Congress to create an immunity.

The present tax is a nondiscriminatory tax on income applied to salaries at a specified rate. It is not in form or substance a tax upon the Home Owners' Loan Corporation or its property or income, nor is it paid by the Corporation or the Government from their funds. It is laid upon income which becomes the property of the taxpayer when received as compensation for his services; and the tax laid upon the privilege of receiving it is paid from his private funds and not from the funds of the Government, either directly or indirectly. The theory, which once won a qualified approval, that a tax on income is legally or economically a tax on its source, is no longer tenable (*New York ex rel. Cohn v. Graves*, 300 U. S. 308, 313, 314; *Hale v. State Board*, 302 U. S. 95, 108; *Helvering v. Gerhardt*, *supra*; cf. *Metcalf & Eddy v. Mitchell*, 269 U. S. 514; *Fox Film Corp. v. Doyal*, 286 U. S. 123; *James v. Dravo Contracting Co.*, *supra*, 149; *Helvering v. Mountain Producers Corporation*, 303 U. S. 376), and the only possible basis for implying a constitutional immunity from State income tax of the salary of an employee of the National Government or of a governmental agency is that the economic burden of the tax is in some way passed on so as to impose a burden on the National Government tantamount to an interference by one government with the other in the performance of its functions.

In the four cases in which this court has held that the salary of an officer or employe of one government or its instrumentality was immune from taxation by the other it was assumed, without discussion, that the immunity of a government or its instrumentality extends to the salaries of its officers and employes.<sup>4</sup> This assumption, made with respect to

<sup>4</sup> In *Dobbins v. Commissioners of Erie County* (16 Pet. 435), a Pennsylvania tax, nominally laid upon the office of the captain of a Federal revenue cutter, but roughly measured by the salary paid to the officer, was held invalid. The court seems to have rested its decision in part on the ground that a tax on the emoluments of his office was the equivalent of a tax upon an activity of the national government, and in part on the ground that it was an infringement of the implied superior power of Congress to fix the compensation of government employes without diminution by State taxation.

In *Collector v. Day* (11 Wall. 113), this court held that the salary of a State probate judge was constitutionally immune from Federal income tax on the grounds that the salary of an officer of a State is exempt from Federal taxation if the function he performs as an officer is exempt, citing *Dobbins v. Commissioner of Erie County*, *supra*, and that there was an implied constitutional restriction upon the power of the national government to tax a State in the exercise of those func-

the salary of a governmental officer in *Dobbins v. Commissioners of Erie County*, 16 Pet. 435, and in *Collector* day 11 Wall. 113, was later extended to confer immunity on income derived by a lessee from lands leased to him by the government in the performance of a governmental function, *Gillespie v. Oklahoma*, 257 U. S. 501; *Burnet v. Coronado Oil and Gas Company*, 285 U. S. 393, and cases cited, although the claim of a like exemption from tax on the income of a contractor engaged in carrying out a government project was rejected both in the case of a contractor with a State, *Metcalf & Eddy v. Mitchell*, *supra*, and of a contractor with the national government, *James v. Dravo Contracting Company*, *supra*.

The ultimate repudiation in *Helvering v. Mountain Producers Corporation*, *supra*, of the doctrine that a tax on the income of a lessee derived from a lease of government owned or controlled lands is a forbidden interference with the activities of the government concerned led to the re-examination by this court, in the *Gerhardt* case, of the theory underlying the asserted immunity from taxation by one government of salaries of employes of the other. It was there pointed out that the implied immunity of one government and its agencies from taxation by the other should, as a principle of Constitutional construction, be narrowly

tions which were essential to the maintenance of State governments as they were organized at the time when the Constitution was adopted. The possibility that a non-discriminatory tax upon the income of a State officer did not involve any substantial interference with the functioning of the State government was not discussed either in this or the *Dobbins* case.

In *New York ex rel. Rogers v. Graves* (229 U. S. 401), the question was whether the salary of the general counsel of the Panama Railroad Company was exempt from State income tax because the railroad company was an instrumentality of the Federal Government. The sole question raised by the taxing State was whether the railroad company was a government instrumentality. The Court, having found that the railroad company was such an instrumentality, disposed of the matter of tax exemption of the salary of its employes by declaring: "The railroad company, being immune from State taxation, it necessarily results that fixed salaries and compensation paid to its officers and employes in their capacity as such are likewise immune." (*New York ex rel. Rogers v. Graves*, *supra*, 408.)

In *Brush v. Commissioner* (300 U. S. 352), the applicable Treasury regulation upon which the government relied exempted from Federal income tax the compensation of "State officers and employes" for "services rendered in connection with the exercise of an essential governmental function of the State." The Court held that the maintenance of the public water system of New York City was an essential governmental function, and in determining whether the salary of the engineer in charge of that project was subject to Federal income tax the court declared, citing *New York ex rel. Rogers v. Graves*, *supra*, 408: "The answer depends upon whether the water system of the city was created and is conducted in the exercise of the city's governmental functions. If so, its operations are immune from Federal taxation and, as a necessary corollary, 'fixed salaries and compensation paid to its officers and employes in their capacity as such are likewise immune.'" (*Brush v. Commissioner*, *supra*, 360.)

restricted. For the expansion of the immunity of the one government correspondingly curtails the sovereign power of the other to tax, and where that immunity is invoked by the private citizen it tends to operate for his benefit at the expense of the taxing government and without corresponding benefit to the government in whose name the immunity is claimed. (See *Metcalf & Eddy v. Mitchell*, *supra*, 523-24; *James v. Dravo Contracting Company*, *supra*, 156-58.) It was further pointed out that, as applied to the taxation of salaries of the employes of one government, the purpose of the immunity was not to confer benefits on the employes by relieving them from contributing their share of the financial support of the other government, whose benefits they enjoy, or to give an advantage to that government by enabling it to engage employes at salaries lower than those paid for like services by other employers, public or private,<sup>5</sup> but to prevent undue interference with the one government by imposing on it the tax burdens of the other.

In applying these controlling principles in the Gerhardt case the court held that the salaries of employes of the New York Port Authority, a State instrumentality created by New York and New Jersey, were not immune from Federal income tax, even though the Authority be regarded as not subject to Federal taxation. It was said that the taxpayers enjoyed the benefit and protection of the laws of the United States and were under a duty, common to all citizens, to contribute financial support to the government; that the tax laid on their salaries and paid by them could be said to affect or burden their employer, the Port Authority, or the State creating it, only so far as the burden of the tax was economically passed on to the employer; that a non-discriminatory tax laid on the income of all members of the community could not be assumed to obstruct the function which New York and New Jersey had undertaken to perform, or to cast an economic burden upon them, more than does the general taxation of property and income which, to some extent, incapable of measurement by economists, may tend to raise the price level of labor and materials.<sup>6</sup> The Court concluded that the

<sup>5</sup> The fact that the expenses of the one government might be lessened if all those who deal with it were exempt from taxation by the other was thought not to be an adequate basis for tax immunity in *Metcalf v. Eddy v. Mitchell* (269 U. S. 514); *Group No. 1 Oil Corp. v. Bass* (283 U. S. 279); *Burnet v. Jergins Trust* (288 U. S. 508); *James v. Dravo Contracting Co.* (302 U. S. 134); *Helvering v. Mountain Producers Corp.* (303 U. S. 376).

<sup>6</sup> That the economic burden of a tax on salaries if passed on to the employer or that employes will accept a lower Government salary because of its tax immunity, are formulas which have not won acceptance by economists and cannot be judicially assumed. As to the "passing on" of the economic burden of the tax, see Seligman, *Income Tax*, VII *Encyclopedia of Social Sciences*, 626-638; Plehn, *Public*



claimed immunity would do no more than relieve the taxpayers from the duty of financial support to the National Government in order to secure to the State a theoretical advantage, speculative in character and measurement, and too unsubstantial to form the basis of an implied constitutional immunity from taxation.

The conclusion reached in the Gerhardt case that in terms of constitutional tax immunity a Federal income tax on the salary of an employe is not a prohibited burden on the employer makes it imperative that we should consider anew the immunity here claimed for the salary of an employe of a Federal instrumentality.

As already indicated, such differences as there may be between the implied tax immunity of a State and the corresponding immunity of the national government and its instrumentalities may be traced to the fact that the national government is one of delegated powers, in the exercise of which it is supreme. Whatever scope this may give to the national government to claim immunity from State taxation of all instrumentalities which it may constitutionally create, and whatever authority Congress may possess as incidental to the exercise of its delegated powers to grant or withhold immunity from State taxation, Congress has not sought in this case to exercise such power. Hence these distinctions between the two types of immunity cannot affect the question with which we are concerned.

The burden on government of a nondiscriminatory income tax applied to the salary of the employe of a government or its instrumentality is the same, whether a State or National Government is concerned. The determination in the Gerhardt case that the Federal income tax imposed on the employes of the Port Authority was not a burden on the Port Authority made it unnecessary to consider whether the Authority itself was immune from Federal taxation; the claimed immunity failed because even if the Port Authority were itself immune from Federal income tax, the tax upon the income of its employes cast upon it no unconstitutional burden.

Assuming, as we do, that the Home Owners Loan Corporation is clothed with the same immunity from State taxation as the government itself, we cannot say that the present tax on the income of its employes lays any unconstitutional burden upon it. All the reasons for refusing

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Finance (5th ed.), p. 320; Buehler, Public Finance, p. 240; Lutz, Public Finance (2d ed.), p. 336, and see *Indian Motorcycle Co. v. United States* (283 U. S. 570, 581, footnote 1). As to preference for Government employment because the salary is tax exempt, see Dickinson, *Compensating Industrial Effort* (1937), pp. 7-8; Douglas, *The Reality of Non-Commercial Incentives in Industrial Life*, ch. V of *The Trend of Economics* (1924); vol. I, Fetter, *Economic Principles* (1915), p. 203.



to imply a Constitutional prohibition of Federal income taxation of salaries of State employes, stated at length in the Gerhardt case, are of equal force when immunity is claimed from State income tax on salaries paid by the National Government or its agencies. In this respect we perceive no basis for a difference in result, whether the taxed income be salary or some other form of compensation, or whether the taxpayer be an employe or an officer of either a State or the National Government, or of its instrumentalities.

In no case is there basis for the assumption that any such tangible or certain economic burden is imposed on the government concerned as would justify a court's declaring that the taxpayer is clothed with the implied constitutional tax immunity of the government by which he is employed. That assumption, made in *Collector v. Day*, *supra*, and in *New York ex rel. Rogers v. Graves*, *supra*, is contrary to the reasoning and to the conclusions reached in the Gerhardt case and in *Metcalf & Eddy v. Mitchell*, *supra*; *Group No. 1 Oil Corporation v. Bass*, 283 U. S. 279; *James v. Dravo Contracting Co.*, *supra*; *Helvering v. Mountain Producers Corp.*, *supra*; *McLoughlin v. Commissioner*, 303 U. S. 218. In their light the assumption can no longer be made. *Collector v. Day*, *supra*, and *New York ex rel. Rogers v. Graves*, *supra*, are overruled so far as they recognize an implied constitutional immunity from income taxation of the salaries of officers or employees of the National or a State Government or their instrumentalities.

So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, State or National, as may be passed on economically to that government through the effect of the tax on the price level of labor or materials is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the National and State Governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because, if allowed, it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the State governments.

Reversed.

Mr. Chief Justice Hughes concurs in the result.

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Mr. Justice Frankfurter, concurring.

I join in the Court's opinion, but deem it appropriate to add a few remarks. The volume of the Court's business has long since made impossible the early healthy practice whereby the Justices gave expression to individual opinions.<sup>7</sup> But the old tradition still has relevance when an important shift in constitutional doctrine is announced after a reconstruction in the membership of the Court. Such shifts of opinion should not derive from mere private judgment. They must be duly mindful of the necessary demands of continuity in civilized society. A reversal of a long current of decisions can be justified only if rooted in the Constitution itself as an historic document designed for a developing nation.

For 120 years this Court has been concerned with claims of immunity from taxes imposed by one authority in our dual system of government because of the taxpayer's relation to the other. The basis for the Court's intervention in this field has not been any explicit provision of the Constitution. The States, after they formed the Union, continued to have the same range of taxing power which they had before, barring only duties affecting exports, imports, and on tonnage.<sup>8</sup> Congress, on the other hand, to lay taxes in order "to pay the debts and provide for the common defense and general welfare of the United States," article I, section 8, can reach every person and every dollar in the land with due regard to constitutional limitations as to the method of laying taxes. But, as is true of other great activities of the State and National Governments, the fact that we are a federalism raises problems regarding the vital powers of taxation. Since two governments have authority within the same territory, neither through its power to tax can be allowed to cripple the operations of the other. Therefore State and Federal Governments must avoid exactions which discriminate against each other or obviously interfere with one another's operations. These were the determining considerations that led the great Chief Justice to strike down the Maryland statute as an unambiguous measure of discrimination against the use by the United States of the Bank of the United States as one of its instruments of government.

The arguments upon which *McCulloch v. Maryland* (4 Wheat. 316) rested had their roots in actuality. But they have been distorted by sterile refinements unrelated to affairs. These refinements derived authority from an unfortunate remark in the opinion in *McCulloch* against

<sup>7</sup> The state of the docket of the High Court of Australia and that of the Supreme Court of Canada still permits them to continue the classic practice of seriatim opinions.

<sup>8</sup> Article 1, sec. 10, U. S. Constitution.

Maryland. Partly as a flourish of rhetoric and partly because the intellectual fashion of the times indulged a free use of absolutes, Chief Justice Marshall gave currency to the phrase that "the power to tax involves the power to destroy" (Id., at p. 431). This dictum was treated as though it were a constitutional mandate. But not without protest. One of the most trenchant minds on the Marshall court, Justice William Johnson, early analyzed the dangerous inroads upon the political freedom of the States and the Union within their respective orbits resulting from a doctrinaire application of the generalities uttered in the course of the opinion in *McCulloch against Maryland*.<sup>9</sup> The seductive cliché that the power to tax involves the power to destroy was fused with another assumption, likewise not to be found in the Constitution itself, namely the doctrine that the immunities are correlative—because the existence of the National Government implies immunities from State taxation, the existence of State governments implies equivalent immunities from Federal taxation. When this doctrine was first applied Mr. Justice Bradley registered a powerful dissent,<sup>10</sup> the force of which gathered rather than lost strength with time. *Collector v. Day* (11 Wall. 113, 128).

All these doctrines of intergovernmental immunity have until recently been moving in the realm of what Lincoln called "pernicious abstractions." The web of unreality spun from Marshall's famous dictum was brushed away by one stroke of Mr. Justice Holmes' pen: "The power to tax is not the power to destroy while this Court sits" (*Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 223 (dissent)). Failure to exempt public functionaries from the universal duties of citizenship to pay for the costs of government was hypothetically transmuted into hostile action of one government against the other. A succession of decisions thereby withdrew from the taxing power of the States and Nation a very considerable range of wealth without regard to the actual workings of our federalism,<sup>11</sup> and this, too, when the financial needs of all govern-

<sup>9</sup> *Weston v. City Council of Charleston* (2 Pet. 449, 472-473).

<sup>10</sup> "I dissent from the opinion of the Court in this case, because it seems to me that the General Government has the same power of taxing the income of officers of the State governments as it has of taxing that of its own officers. \* \* \* In my judgment, the limitation of the power of taxation in the General Government, which the present decision establishes, will be found very difficult of control. Where are we to stop in enumerating the functions of the State governments which will be interfered with by Federal taxation? \* \* \* How can we now tell what the effect of this decision will be? I cannot but regard it as founded on a fallacy, and that it will lead to mischievous consequences" (11 Wall. 113, 128-129).

<sup>11</sup> E. g., *Gillespie v. Oklahoma*, 257 U. S. 501; *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218; *Macallen Co. v. Massachusetts*, 279 U. S. 620; *Indian Motorcycle Co. v. United States*, 283 U. S. 570; *Burnet v. Coronado Oil & Gas Co.*, 285 U. S. 393; *New York ex rel. Rogers v. Graves*, 299 U. S. 401; *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352.

ments began steadily to mount. These decisions have encountered increasing dissent.<sup>12</sup> In view of the powerful pull of our decisions upon the courts charged with maintaining the constitutional equilibrium of the two other great English federalisms, the Canadian and the Australian courts were at first inclined to follow the earlier doctrines of this Court regarding intergovernmental immunity.<sup>13</sup> Both the Supreme Court of Canada and the High Court of Australia on fuller consideration—and for present purposes the British North America Act (30–31 Vict., c. 3) and the Commonwealth of Australia Constitution Act (63–64 Vict., c. 12) raise the same legal issues as does our Constitution<sup>14</sup>—have completely rejected the doctrine of intergovernmental immunity.<sup>15</sup> In this Court dissents have gradually become majority opinions, and even before the present decision the rationale of the doctrine had been undermined.<sup>16</sup>

The judicial history of this doctrine of immunity is a striking illustration of an occasional tendency to encrust unwarranted interpretations upon the Constitution and thereafter to consider merely what has been judicially said about the Constitution, rather than to be primarily controlled by a fair conception of the Constitution. Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purposed vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it.<sup>17</sup> Neither *Dobbins v. Commissioners* (16 Pet. 435), and its offspring, nor *Collector*

<sup>12</sup> E. g., Mr. Justice Brandeis, dissenting, in *Jaybird Mining Co. v. Weir*, 271 U. S. 609, 615; Justice Holmes, dissenting, in *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218, 222; Mr. Justice Stone, dissenting, in *Indian Motorcycle Co. v. United States*, 283 U. S. 570, 580; Mr. Justice Roberts, dissenting, in *Brush v. Commissioner of Internal Revenue*, 300 U. S. 352, 374. See also Mr. Justice Black, concurring, in *Helvering v. Gerhardt*, 304 U. S. 405, 424.

<sup>13</sup> *Bank of Toronto v. Lambe*, 12 App. Cas. 575; *D'Emden v. Pedder*, 1 C. L. R. 91.

<sup>14</sup> Especially is this true of the Australian Constitution. One of its framers, who afterward became one of the most distinguished of Australian judges, Mr. Justice Higgins, characterized it as having followed our Constitution with "pendantic imitation." *Australasian Temperance and General Mutual Life Assurance Co., Ltd., v. Howe*, 31 C. L. R. 290, 330.

<sup>15</sup> *Abbott v. City of St. John*, 40 Can. Sup. Ct. 597; *Caron v. The King*, (1924) A. C. 999; *Amalgamated Society of Engineers v. Adelaide Steamship Co., Ltd.*, 28 C. L. R. 129; *West v. Commissioner of Taxation*, 56 C. L. R. 657.

<sup>16</sup> E. g., *James v. Dravo Contracting Co.*, 302 U. S. 134; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376; *Helvering v. Gerhardt*, 304 U. S. 405.

<sup>17</sup> Compare Taney, C. J., in *Passenger cases* (7 How. 283, 470): "I \* \* \* am quite willing that it be regarded as the law of this Court that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported."

v. *Day*, *supra*, and its, can stand appeal to the Constitution and its historic purposes. Since both are the starting points of an interdependent doctrine, both should be, as I assume them to be overruled this day. Whether Congress may, by express legislation, relieve its functionaries from their civic obligations to pay for the benefits of the State Government under which they live is matter for another day.

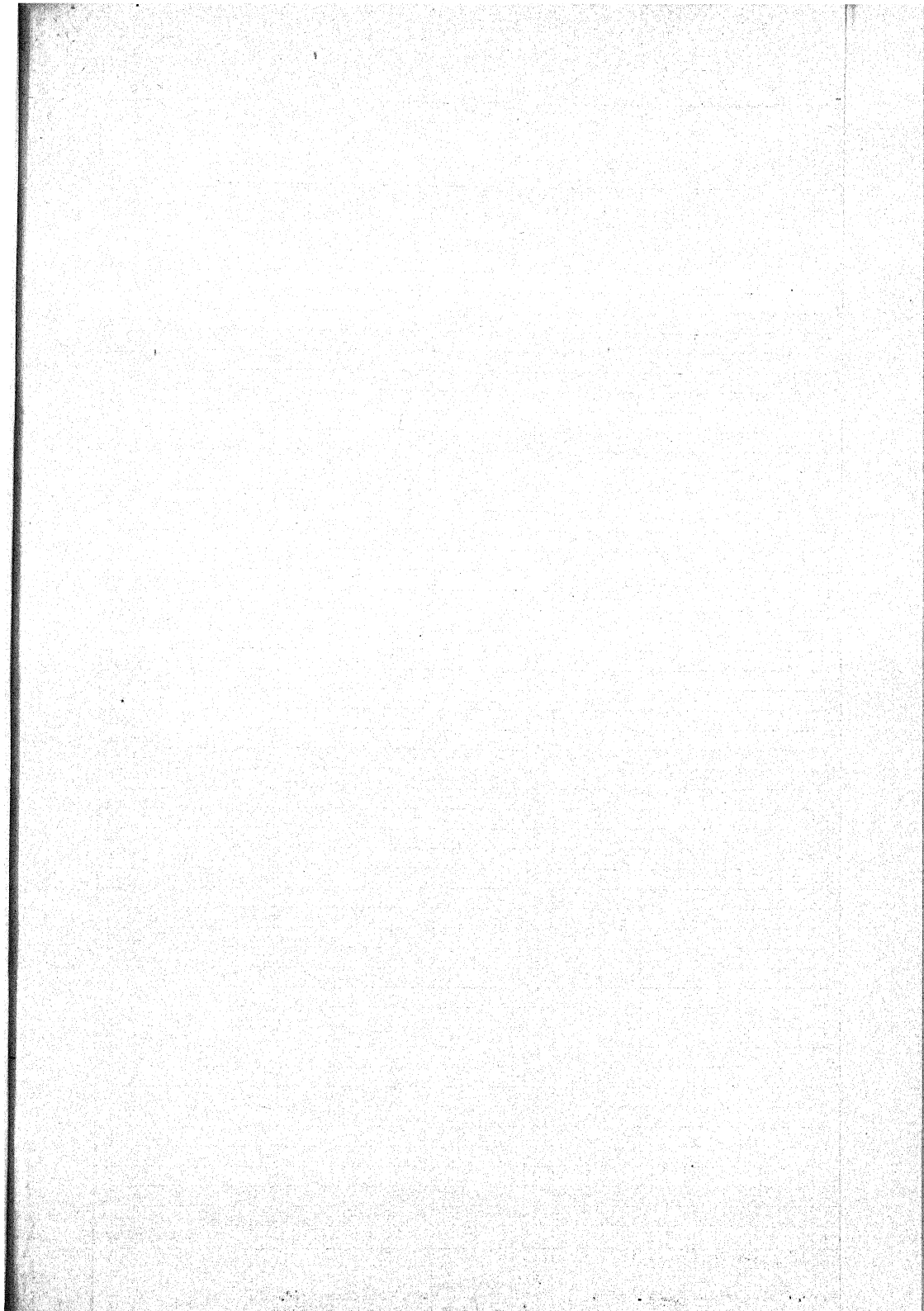
MR. JUSTICE BUTLER, DISSENTING:

Mr. Justice McReynolds and I are of the opinion that the Home Owners Loan Corporation, being an instrumentality of the United States, heretofore deemed immune from State taxation, "it necessarily results," as held in *New York ex rel. Rogers v. Graves* (1937) (299 U. S. 401), "that fixed salaries and compensation paid to its officers and employes in their capacity as such are likewise immune"; and that the judgment of the State court, unquestionably by that decision, should be affirmed.

From the decision just announced it is clear that the Court has overruled *Dobbins v. The Commissioners of Erie County* (1842) (16 Pet. 435); *Collector v. Day* (1871) (11 Wall. 113); *New York ex rel. Rogers v. Graves*, *supra*, and *Brush v. Commissioner* (1937) (300 U. S. 352). Thus now it appears that the United States has always had power to tax salaries of State officers and employes and that similarly free have been the States to tax salaries of officers and employes of the United States. The compensation for past as well as for future service to be taxed and the rates prescribed in the exertion of the newly disclosed power depend on legislative discretion not subject to judicial revision. Futile indeed are the vague intimations that this Court may protect against excessive or destructive taxation. Where the power to tax exists, legislatures may exert it to destroy, to discourage, to protect or exclusively for the purpose of raising revenue. See e. g. *Veazie Bank v. Fenno* (8 Wall. 533, 548); *McCray v. United States* (195 U. S. 27, 53 et seq.); *Magnano Co. v. Hamilton* (292 U. S. 40, 44 et seq.); *Cincinnati Soap Co. v. United States* (301 U. S. 308).

Appraisal of lurking or apparent implications of the court's opinion can serve no useful end for, should occasion arise, they may be ignored or given direction differing from that at first seemingly intended. But safely it may be said that presently marked for destruction is the doctrine of reciprocal immunity that, by recent decisions here, has been so much impaired.

[This decision was followed immediately by another, *State Tax Commission of Utah v. Van Cott* (306 U. S. 511-516), in which the Supreme Court again explicitly upheld the right of a state to tax salaries of federal officials and employees.]





	INCOME TAXES		DEATH TAXES	S.	
	Individuals	Corporations		Cigars	Cigarettes
Alabama.....			★	★	★
Arizona.....			★		
Arkansas.....	★	★	★	★	★
California.....		★	★		
Colorado.....			★		
Connecticut.....		★	★		
Delaware.....	★		★		
Florida.....			★		
Georgia.....	★	★	★	★	★
Idaho.....	★	★	★		
Illinois.....	★		★		
Indiana.....			★		
Iowa.....			★		★
Kansas.....			★		★
Kentucky.....			★		
Louisiana.....			★		
Maine.....			★		
Maryland.....			★		
Massachusetts.....	★	★	★		
Michigan.....			★		
Minnesota.....			★		
Mississippi.....	★	★	★	★	★
Missouri.....	★	★	★		
Montana.....		★	★		
Nebraska.....			★		
Nevada.....					
New Hampshire.....	★		★		
New Jersey.....			★		
New Mexico.....			★		
New York.....	★	★	★		
North Carolina.....	★	★	★		
North Dakota.....	★	★	★		★
Ohio.....	★		★		★
Oklahoma.....	★	★	★		
Oregon.....	★	★	★		
Pennsylvania.....			★		
Rhode Island.....			★		
South Carolina.....	★	★	★	★	★
South Dakota.....			★		★
Tennessee.....	★	★		★	★
Texas.....			★		★
Utah.....	★	★	★		★
Vermont.....	★	★	★		
Virginia.....	★	★	★		
Washington.....			★		
West Virginia.....			★		
Wisconsin.....	★	★	★		
Wyoming.....			★		
Total Duplications.....	21	20	47	6	13

*Sales taxes on tangibles*

Tobacco and Snuff: North Dakota, South Carolina, Tennessee

Cigarette Papers: Iowa, Kansas, North Dakota, South Dakota, Utah

Automobiles: South Dakota

## 92. CONFLICTING TAXATION

One of the most acute problems before our various governmental units is that of securing the revenue required for carrying on the essential activities of each of those units. The tendency towards the taxation of the same subjects by the local, state, and national governments has operated to the particular disadvantage of the states and localities, since the national government has the better means of collection and its action tends to dry up the sources of revenue for the other governments. State and local officials have therefore been particularly concerned about this problem of conflicting or duplicating taxation, and have made various proposals from time to time. (a. Table of Conflicting Taxation on facing page.)

### b. Proposal of Governor Lehman

[Letter of Governor Lehman of New York to Senator Harrison, Chairman of Senate Committee on Finance. Text in *New York Times*, Mar. 22, 1938, p. 2.]

Dear Senator Harrison:

Will you not have this communication read into the record of the hearings of the pending 1938 Federal Revenue Act? A busy legislative session, just concluded, has prevented me from communicating with you sooner.

At the very outset let me say that I am asking on behalf of the Empire State and all other American States and Territories that the Federal Revenue Act be amended to provide for:

(a) Fifty per cent credit against the Federal estate tax on account of death duties paid to the States and Territories, and,

(b) An extension of the credit at the same rate to the Federal gift tax.

The reasons which impel me to make this request are as follows:

1. *The independent sovereignty of the States is threatened by Federal taxing policy.* This country was organized on the theory and has prospered under a system of independent States with exclusive authority in many fields and with independent taxing power, a power not second to but on a parity with the Federal Government itself.

*Under such conditions, if one of two governments, having equal concurrent jurisdiction to levy a tax, actually monopolizes the field to the exclusion or the near exclusion of the other, it may follow that that other government will be destroyed or at least starved into impotency.*

The extent to which the Federal Government has and is ignoring the rights of the States in the income (personal and corporate) and estate tax fields and virtually monopolizing those fields to the exclusion of the States is truly alarming. *The result is that the bulk of State and local revenue is shouldered on real property and that many of the States and*

*their localities have been forced to enact tax laws not suited to State and local use and uneconomic in their effects.*

I give you these thoughts because I am profoundly convinced of their importance if this country is to continue according to the pattern originally planned.

2. The rights of American States to impose death duties are equal—superior, it is believed—to those of the Federal Government. This is so for two reasons:

(a) The right to transmit property at death and the right to inherit property from a decedent are rights gained under State laws;

(b) Traditionally and historically, this field of taxation was recognized as belonging to the States and was used by them long before it was invaded by the Federal Government.

3. The Federal tax fixes the ceiling for State taxes. The proposed Federal estate tax is graduated to 70 per cent and in the case of the larger estates takes considerably more than one-half.

In the lower brackets, the percentage taken is as high, if not higher, than should be reasonably exacted. It is unthinkable that the States will superimpose upon the Federal tax still higher duties. To do so would be unfair and uneconomic. Hence, for every practical purpose the rates of State estate taxes will be limited to one-sixth of the Federal rates in the various brackets.

4. The proposed law assumes the States have but a one-sixth right to tax estates. In this connection, it will be recalled that the Federal Revenue Act of 1926 graduated estate tax rates to 20 per cent and allowed, as a credit against the Federal tax, death duties paid to the States, but not to exceed 80 per cent of the Federal tax.

Later, in 1932, the Federal Government imposed an additional estate tax with rates graduated to 70 per cent, but with no additional credit on account of death duties paid to the States.

It is now proposed, and sensibly so, to combine the two Federal estate taxes. However, it is proposed to allow against the combined taxes a credit of  $16\frac{1}{2}$  per cent on account of death duties paid to the State.

Stated bluntly, this ignores the equal rights of the States to levy death duties and for every practical purpose tells these sovereign States they have a right to but one-sixth of the revenue to be derived from estate taxation. There is no justification for such an attitude on the part of the parent government. Its position cannot be defended.

As the States have equal, if not a superior, claim to revenue from estate taxation, the credit for death duties should be not less than 50 per cent.

5. Federal taxes increased, credit for State taxes decreased. An analysis of this measure discloses that on net estates of \$700,000 and more Federal taxes are increased from a fraction per cent to more than 4 per cent and that the credit for State taxes is decreased from a fraction per cent to 14 per cent. Thus it will be seen that the States are left in a less favorable condition than they now find themselves.

The consolidation of the two Federal estate taxes should not be used to cover an increase in rates or a decrease in the credit allowed for death duties paid to the States.

6. A credit should be allowed against Federal gift taxes for gift taxes paid to States. The Federal estate tax was supplemented by a Federal gift tax with rates graduated at 75 per cent of the estate tax rates, but no credit was allowed for gift taxes paid to the States and none is proposed in this measure.

The principal purpose of the gift tax was to prevent evasion of the estate tax through the medium of inter vivos gifts. A gift tax is necessary whenever estate taxes reach high levels. In such cases it may, for every practical purpose, be said to be an integral part of death taxation.

It is therefore perfectly obvious that the Federal gift tax should be amended to allow credit for gift taxes paid to States and on the same percentage basis as is allowed in the estate tax.

In closing, may I not leave with you two further thoughts which have a bearing upon this subject?

The first is that the States have to plan not only for their own financing but for State aid to their municipal and political subdivisions.

Except during war times the services which the States and their localities render to their people are just as important and beneficial as those rendered by the Federal Government. Certainly they are more intimate and personal. The States are encountering increasing difficulty in devising revenue means for their own financing and the financing of the localities.

The second is the ultimate effect of existing high rates of taxation on incomes and estates on revenue yields in future years.

The yields of these taxes depend in a large measure on the high rates in the middle and higher brackets. The effect of existing estate tax rates and those proposed in the measure before you will be to break up sizable estates and require the payment of taxes out of capital. The effect of the present schedule of income tax rates will be to prevent the accumulation of large estates.

The result of both these will be a diminution of yield in future years,

and this even though there be an increase in national income as great as may reasonably be expected.

This is a problem which I am sure you and your colleagues will wish to consider. No doubt the need for revenue will be as great in future years as at present. Is it wise to continue a policy which will immediately secure additional revenue dollars at the expense of the revenue of future years?

Yours very sincerely,

HERBERT H. LEHMAN.

### c. Proposal of Mayor LaGuardia

[Address of Mayor LaGuardia of New York City, before New York Board of Trade, Jan. 10, 1940. Text in *New York Times*, Jan. 11, 1940, p. 15.]

Mr. Chairman and Gentlemen: Every four years in this country we have an epidemic of slogans and epigrams, and we are about to embark upon that season this year. There is a great deal of discussion about government spending and about retrenchment of expenditures, and you will necessarily have to listen to a great deal of talk between now and the first Tuesday of November on that subject. Now you can teach a parrot to say "Balance the Budget." That is very easy to say, but it requires a great deal of statesmanship, knowledge of government finances and the courage to be realistic and face the facts frankly. And the necessity of being realistic and facing the facts applies to the taxpayer as well as to the official in office or seeking office.

When one suggests balancing of the budget there are two factors that must be considered: First, of course, is that of revenue, available revenue. The second is our necessary expenditures. As to the expenditures there may be differences of opinion, according to the school of thought as to what is the function of government and just how far government must intervene in meeting periods of economic stress, unemployment, public health and economic security.

But there is one aspect of the revenue-producing field about which surely there can be no difference of opinion. That is the existing condition of the duplication and overlapping of taxes and the burden brought about by such duplication and overlapping, the harassing of the taxpayer by the necessity of reporting to various agencies of government and the disadvantage it places upon those States which have large expenditures. This requires a frank approach.

The solving of the problem is not so difficult as it might appear. Originally, there was a distinct division between the sources of revenue



for the Federal Government and that for the States. We cannot profit very much by a review of historical development of taxation in this country, because of changed conditions. There was a time, as you know, when the receipts from customs and a very few excise taxes were sufficient to maintain the government; in fact, on two occasions the Federal Government made a distribution among the States. "Them days are gone forever!"

You can't expect that. The functions of the Federal Government were limited, the expenditures were low, and there was no difficulty in the Federal Government's finding sufficient revenue in the limited field that it preempted. As the cost of government increased, naturally the Federal Government had to look for additional revenue, and that was first felt during the Civil War.

The first personal income tax law was enacted in 1861, and it provided a tax of 3 per cent on all personal income over \$800; but before it went into effect the Act of 1862 was adopted which provided a 3 per cent rate on all annual incomes over \$600 and 5 per cent on all over \$10,000. There were increases in 1865. There were reduced rates in the income taxes in 1867 and 1870. Their constitutionality was tested, and they were attacked on the ground that they did not come within the constitutional requirements that all direct taxes should be apportioned among the States according to population. But the Supreme Court of the United States held the tax valid. It was an out and out income tax, yet they held it valid as not a direct tax.

The Act of 1870 expired in 1872, and not until 1894 was there another income tax enacted by Congress. The Act of 1894 provided 2 per cent on all incomes over \$4,000. That act was attacked and in the famous case of *Pollock v. The Farmers Loan and Trust Company* in 1895, the tax was declared unconstitutional as violating the constitutional provision that direct taxes be apportioned among the States according to population. It is interesting to note that even the views of the Supreme Court change from time to time.

After the *Pollock v. The Farmers Loan and Trust Company* case, as you all know, the Sixteenth Amendment was ratified in 1913, and the problem was met squarely by providing that "Congress shall have the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States and without regard to any census or enumeration." That was the direct result of the decision in 1895 on that income tax. Immediately thereafter in 1913 we had the first personal income tax and corporate income tax under the Sixteenth Amendment.



There has been quite a range of the rate from 1 per cent on all individual incomes over \$3,000 (that is about the lowest normal Federal tax rate) up to the 1918 act, which I helped to draft, which provided for a 6 per cent normal tax on \$4,000, 12 per cent normal over 4,000, and a surplus tax of 1 per cent over \$5,000, all the way to 65 per cent over \$2,000,000. There are variations in rates in the other Federal tax statutes. This is the field where the first noticeable overlapping of taxes occurred, and we find now that thirty-four States have individual income taxes and thirty-two have corporate income taxes in addition to the Federal taxes.

In 1932, only eight years ago, just twenty States had income taxes. Now, as we get into this field of duplication of taxes, there are two features you must bear in mind: One is the excess taxation from that particular source, the difficulties in making separate returns, one to the State and one to the Federal Government, and then, second, the disadvantage which it places upon a State which necessarily must impose an income tax to derive necessary revenue as compared with the State that does not impose such a tax. Perhaps it was not as noticeable heretofore as it is now because it was not felt as much.

However, in addition to this disadvantage, we find that certain States have developed a technique of not imposing these taxes and getting all the advantage by competing with States that must have this additional revenue. That is true not only in corporate and personal income taxes but also in inheritance taxes, payroll and unemployment taxes and in excise or sales taxes. Thirty-two States now have corporate income taxes. Forty-seven States have inheritance taxes, and I will tell you why in just a moment. Forty-eight States have unemployment or payroll taxes, and I will tell you the reason for that, too. Alcohol and gasoline taxes are duplicated in forty-eight States; tobacco in twenty-six States—only in thirteen States eight years ago. The oleomargarine tax, which is not really a revenue but more in the nature of a protective tax, is duplicated in twenty-four States.

Our first experience in seeking to avoid the duplication, and what we might term the unfair competition, was with the inheritance tax. Under the act of 1924, after a great deal of thought and study, the Ramsey amendment was offered from the floor of the House of Representatives providing a credit to the State up to 25 per cent of the tax if the State imposed such a tax. The 1926 act provided a Federal credit of 80 per cent on tax paid to the State, and that is the provision now in operation.

The debate on that, gentlemen, was very interesting. We had a State inheritance tax in New York, and naturally we were for the amendment,

but our neighboring State of Connecticut had no inheritance tax, and Florida, if you remember, had no inheritance tax. It was just about that time that a great many of our most fortunate citizens in New York suddenly became interested in the climate in Florida.

That amendment was fought very bitterly in the House and it passed. What was the result? You have it here (indicating tables). Since that time forty-seven States have adopted an inheritance tax in order to get the credit of the Federal inheritance tax—every State except the State of Nevada. That has brought about a uniformity so that this sudden shift of population for the purpose of benefiting on the inheritance tax has been stopped entirely. Florida attacked the crediting provision, and the United States Supreme Court held that “the contention that the Federal tax is not uniform because other States impose inheritance taxes while Florida does not is without merit.” The decision goes on to point out that the tax must be uniform only in its application.

I stress the decision of the Supreme Court of the United States holding valid what we will call the credit system in Federal taxes, because that removes all argument as to its validity. Therefore, gentlemen, there is one source where economy can be effected, and that is in reducing the number of tax-collecting agencies. Just as the inheritance tax provides for proper credit to each State if it attaches a tax up to a certain point and eliminates all duplication of inheritance taxes, so should it be immediately provided for the personal and corporate income taxes.

Now let me give you an idea of the amount of these taxes. First, we will take customs. Clearly that belongs entirely to the Federal Government, historically and constitutionally. There is no question about that. According to the report of the United States Treasury Department of August, 1939, for the fiscal year ending in 1938, the last available figures, the income from customs was \$359,000,000. There is no duplication there.

As to the property taxes—there is no Federal tax on property. That is local. The property tax is purely local that can be determined wherever it may be located. There is no question about that. The Federal Government does not step in there. There was \$214,000,000 collected by States and \$4,531,000,000 collected by localities. That amounts to 32 per cent of all taxes collected in the nation.

On individual income taxes the Federal Government collected in 1938 \$1,313,000,000 and the States \$249,000,000. You see how easily that could be adjusted.

On the inheritance and gift taxes the Federal Government collected \$417,000,000 and the States \$145,000,000.

On corporate income the Federal Government collected \$1,449,000,000 and the States \$313,000,000.

On the payroll tax, that is the social security and unemployment insurance, \$743,000,000 was collected by the Federal Government and \$707,000,000 by the States. There is a credit system on unemployment insurance taxes. The \$743,000,000 contains the old-age levy. That explains the difference, and because of the credit system parity exists there.

On gasoline taxes the Federal Government collected \$293,000,000, the States collected \$1,163,000,000 and the localities \$25,000,000.

On tobacco the Federal Government collected \$1,136,000,000, the States \$298,000,000 and the localities \$302,000,000.

On sales and other excises the Federal Government collected \$287,000,000, the States \$717,000,000 and the localities \$302,000,000, of which I collected \$44,000,000.

Here are the totals: The total revenue taxes and customs of the Federal Government amounted to \$6,034,000,000; the States \$3,857,000,000, and the localities \$4,920,000,000. The per capita Federal tax was \$46.48; the State \$29.71; the localities \$37.90 or a total of \$114 per capita tax for all three combined.

This idea of remedying tax duplication is not at all original with me, gentlemen. It has been under discussion for at least fifteen years, and there are three different remedies suggested: One is the division of sources. That is not scientific, because in the last analysis the source is always the same; and to obtain an agreement on the division of sources I think is not sufficient in and of itself to meet the situation. The second is that, with the exception of customs, the States should collect and then credit the Federal Government. I certainly would keep shy of that one. The third is that the Federal Government should collect, as they do in the inheritance tax, with a credit on all of these sources of revenue or taxes to the State.

Now I urge a combination of the first and the third: As to taxes that are purely local, such as admission taxes and club dues taxes and property taxes, the Federal Government should get out of that field entirely. They are so local that there is no question as to how they can be collected most economically and in such a manner as to bring the best available revenue. There should be a separation of those taxes that are purely local in character, and the Federal Government should surrender those taxes and leave them to the State or to the municipality. And then as to the others, personal income, corporate income, tobacco, alcohol and gasoline, there should be applied the credit system. Then we would

have but one source of collection, the Federal Government collecting and remitting to the State the allowable credit.

It will be said: How will you get the States to comply? Exactly the same method as was used to make the States comply in the inheritance tax and in the payroll tax, by doing it in this way: If the State enacts a tax up to a certain amount of the Federal income tax (the formula, of course, must be worked out) full credit then is given in payment of the Federal tax, the Federal Government collecting the whole and remitting to the State its portion. If the State fails to impose such a tax, the State then gets no reimbursement and the Federal Government takes all. That would put New York, and the other States that have an income tax, on an equal basis and on a par with the neighboring States around here which advertise the fact that they have no income tax. If the State imposes more than the formula, then it does not participate in the credit allowable under such a plan; and, naturally, no State would do that.

Now take tobacco. In some countries tobacco is a government monopoly. Here we have all of the benefits of a monopoly without any of the headaches of a monopoly because tobacco is certainly carrying all the freight that it possibly can. There are twenty-six States now that have a tax on tobacco in addition to the Federal Government, and it varies all the way from one-half mill on a cigarette up to two mills on a cigarette. The whole table is here, and it is of interest to see the variance on the tobacco tax. Now there is nothing difficult about that. The Federal Government could impose a tax on tobacco and give a certain percentage of credit to the several States on the basis of retail sales. That would remove the duplication of taxes, Federal, State and in some instances local, stop this unfair competition of neighboring States or even neighboring counties, simplify the collection, reduce the cost of collection, and yet bring in a substantial income.

The same is true of alcohol. The Federal Government could take the volume tax on alcohol with a credit to the States under a formula, leaving the license fees for retailing to the municipality, and that would greatly alleviate the difficulty we are having in the enforcement of the excise law pertaining to alcohol. At one time we had 100 men from our Police Department working with an equal or twice the number of treasury agents in this city, detecting and discovering untaxed and bootleg liquor. It was during my time, and I can say that it is extremely difficult in these times to protect tax-paid liquor which faces competition from untaxed liquor, because taxes are so high that there is still a great temptation to bootlegging.

It is interesting to note the effect of some of these State taxes. The stock transfer tax is a very interesting one. If you will look at the Chicago papers you will see them openly advertising and soliciting stock transfer business because of the differential in the stock transfer tax. Even the slight difference between New York and Massachusetts invites and has attracted business that has normally and historically and traditionally been in New York City, and now goes to Boston and Chicago. In that case the Federal Government could impose a stock transfer tax, and perhaps leave it that way, or else provide for a credit to the State where the transfer is made.

Now, gentlemen, something must be done about this. As I said, it has been under discussion for a long time. It was considered at the National Tax Association Conference in 1932. Professor Robert Murray Haig of Columbia, a recognized authority on taxation, made this statement in a very able presentation of the subject. He said: "All taxes may be assigned to the Federal Government, which will then proceed to subsidize the States. This is so radical a proposal that no one has dared to advance it." I do today.

Note how skillfully this is worded. He says, "All taxes may be assigned to the Federal Government, which will then proceed to subsidize . . ." Now I want to amend that: "All taxes may be collected by the Federal Government, which will then proceed to allow due credit to each State." The minute, of course, you get into subsidizing and assigning, then of course, the "States' rights" boys are going to step in.

Now, gentlemen, this is not difficult if it is approached sensibly and honestly. This is no subject to give to the semi-colon boys. If it gets to them, and they start breaking down proposals, we will never get anywhere. Don't forget, gentlemen, I have lived through four or five of these revenue bills as a member of the House. Our tax system has developed the tax bar; it has developed the tax expert and the specialized accountant. They are not going to give up this meal ticket, are they? I should say not.

Therefore, you will have to do something, and you will have to do it very soon. These so-called barriers between States are causing havoc to all the enlightened States. I said that a neighboring State could afford to relinquish a tax and get all the advantage, and I meant just that. If New York State must have additional revenue, and it imposes an income tax, of course New Jersey can afford to say "come to our State, and we won't impose that tax," and get all the benefit of what it can attract by reason of that differential.



The framers of the Constitution had that in mind. In reading the tariff provision of the Constitution and the prohibition against any barriers in interstate commerce, we should also consider the taxing power in the same connection. Thus we can see that they had in mind some sort of a uniform system of taxation to prevent the very condition that is growing every day in this country. If one State has a social welfare program, wants to feed its unemployed, wants proper care for the sick and the disabled and another State fails to provide that, what is the result? I can tell you. The needy come to our State! That is what is happening. In two years they are eligible for assistance, and we have to take care of them, while another State that neglects to do its duty, in addition to throwing an additional burden on an enlightened State, attracts its business and commerce with the promise of lower taxes.

Such a condition cannot continue in this country. That is why I so strongly urge a system of taxation that will bring uniformity throughout every State of the Union, that will avoid duplication and overlapping, that will increase the efficiency of the tax-collecting system, and decrease the cost of tax collection, and thereby reduce to that extent, at least, the burden of taxation.

I hope you will give this subject some thought because it is very important. You will not hear it discussed by candidates. It is too touchy. You cannot please everybody when you talk taxation. Of course, everybody is going to promise reduced taxes, but they must give me a bill of particulars on that one. However, we can bring some relief about by an intelligent, scientific system of taxation, and that I submit for your consideration.

I think we might very well make a start in our own State. I believe it would be very wholesome to consider the revenues of the State in relation to the requirements of the municipalities. You have seen an instance of the need for that in our cigarette tax. I determined when I assumed office in 1934 that I would run the city government on a pay-as-you-go basis; and I have done just that. In order to meet the costs of relief, it was necessary to find additional revenue. Before I took office the city financed relief by long-term borrowings. The last loan that was made was \$70,000,000, payable in ten years. It was spent in fourteen months. When I took office I had five months of that \$70,000,000.

Now, gentlemen, you can readily see that if we had continued that policy of borrowing amounts which take ten years to pay and fourteen months to spend, this city would have been bankrupt by this time. So I asked the Legislature for an enabling act to impose local taxes to meet



the cost of relief. We received that power and it is renewed from year to year.

One of the sources of that emergency tax was the tax on utilities. That brought in \$18,000,000 a year. It worked well for two or three years. Then the State just took two-thirds of that, took \$12,000,000, and left us \$6,000,000. We had to find additional revenue, so we imposed a tax of a penny on a package of cigarettes. That went well for a year, and then the State came along and imposed a two-cent tax on cigarettes, making the tax three cents. Now, mind you, that is within the State.

Every city in this State is hard put to provide revenue for current relief costs. Those cities which have been borrowing on long terms have reached the end of their borrowing capacity. Buffalo has temporary relief now by passing the burden on to Erie County. That is no solution of the problem. There is great danger, again, that the State taxes may overlap. The State needs revenue. Therefore the State may infringe on the sources of revenue of the municipalities. I sincerely hope that the Legislature will give this problem very careful thought and consideration, and invite a conference, if necessary, to avoid the duplications within the State.

That is our immediate problem. The big problem, as I have endeavored to point out, is the conflict and duplication of taxation among the Federal Government and the several States. It is coming to a point where the whole thing will topple over. We have reached the point of diminishing returns on most of these items of taxation. The problem must be faced. I submit it to you for your very careful consideration.

### 93. RELATION BETWEEN TAXING POWER AND POLICE POWER

One of the most important governmental powers is the so-called police power, commonly defined as the power to protect public health, safety, morals, and general welfare. Under our constitutional system, this police power is vested in the states and not in the national government. However, Congress has on numerous occasions used its taxing power in such a way as to regulate or even to destroy practices and businesses thought to be undesirable. For example, Congress, by imposing a tax of two cents a hundred on white phosphorus matches, completely destroyed the white phosphorus match industry and thus protected workmen against a deadly disease. Similarly, by a tax of ten cents a pound on colored oleomargarine, Congress prevented manufacturers from selling such oleomargarine as butter, and thus protected the public against fraud. These measures and others of the same sort were upheld by the courts as a proper exercise of the taxing power. In 1919, after an attempt to suppress child labor through the commerce power had failed, Congress

passed an act imposing a tax of ten per cent on the net profits of firms or corporations employing children below the ages of fourteen to sixteen years. It was hoped in that way to discourage such employment of children, but now the Supreme Court, in spite of its previous rulings, held that this act was merely an attempt to regulate matters within the jurisdiction of the states and was therefore unconstitutional. The use of the taxing power for police purposes was therefore seriously checked, but in recent years there has again been some disposition to return to the earlier rule.

### a. Oleomargarine Case

[*McCray v. United States* (1904), 195 U. S. 27, 53-56; 49 L. Ed. 78, 94-99.]

Mr. Justice White . . . delivered the opinion of the court: . . .

Whilst, as a result of our written Constitution, it is axiomatic that the judicial department of the government is charged with the solemn duty of enforcing the Constitution, and therefore, in cases properly presented, of determining whether a given manifestation of authority has exceeded the power conferred by that instrument, no instance is afforded from the foundation of the government where an act which was within a power conferred, was declared to be repugnant to the Constitution, because it appeared to the judicial mind that the particular exertion of constitutional power was either unwise or unjust. To announce such a principle would amount to declaring that, in our constitutional system, the judiciary was not only charged with the duty of upholding the Constitution, but also with the responsibility of correcting every possible abuse arising from the exercise by the other departments of their conceded authority. So to hold would be to overthrow the entire distinction between the legislative, judicial, and executive departments of the government, upon which our system is founded, and would be a mere act of judicial usurpation.

It is, however, argued, if a lawful power may be exerted for an unlawful purpose, and thus, by abusing the power, it may be made to accomplish a result not intended by the Constitution, all limitations of power must disappear, and the grave function lodged in the judiciary, to confine all the departments within the authority conferred by the Constitution, will be of no avail. This, when reduced to its last analysis, comes to this: that, because a particular department of the government may exert its lawful powers with the object or motive of reaching an end not justified, therefore it becomes the duty of the judiciary to restrain the exercise of a lawful power wherever it seems to the judicial mind that such lawful power has been abused. But this reduces itself to the contention that, under our constitutional system, the abuse by one department of the government of its lawful powers is to be corrected by the abuse of its powers by another department.

The proposition, if sustained, would destroy all distinction between the powers of the respective departments of the government, would put an end to that confidence and respect for each other which it was the purpose of the Constitution to uphold, and would thus be full of danger to the permanence of our institutions. . . .

The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said: from the beginning no case can be found announcing such a doctrine, and, on the contrary, the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747, the often quoted statement of Chief Justice Marshall in *M'Culloch v. Maryland* [4 Wheat. 316, 4 L. ed. 579], that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. . . .

Lastly we come to consider the argument that, even though as a general rule a tax of the nature of the one in question would be within the power of Congress, in this case the tax should be held not to be within such power, because of its effect. This is based on the contention that, as the tax is so large as to destroy the business of manufacturing oleomargarine artificially colored to look like butter, it thus deprives the manufacturers of that article of their freedom to engage in a lawful pursuit, and hence, irrespective of the distribution of powers made by the Constitution, the taxing laws are void, because they violate those fundamental rights which it is the duty of every free government to safeguard, and which, therefore, should be held to be embraced by implied, though none the less potential, guaranties, or, in any event, to be within the protection of the due process clause of the 5th Amendment.

Let us concede, for the sake of argument only, the premise of fact upon which the proposition is based. Moreover, concede, for the sake of argument only, that even although a particular exertion of power by Congress was not restrained by any express limitation of the Constitution, if, by the perverted exercise of such power, so great an abuse was manifested as to destroy fundamental rights which no free government could consistently violate, it would be the duty of the judiciary to hold such acts to be void upon the assumption that the Constitution, by necessary implication, forbade them.

Such concession, however, is not controlling in this case. This follows when the nature of oleomargarine, artificially colored to look like butter, is recalled. As we have said, it has been conclusively settled by this court that the tendency of that article to deceive the public into buying it for butter is such that the states may, in the exertion of their police powers, without violating the due process clause of the 14th Amendment, absolutely prohibit the manufacture of the article. It hence results, that, even although it be true that the effect of the tax in question is to repress the manufacture of artificially colored oleomargarine, it cannot be said that such repression destroys rights which no free government could destroy, and, therefore, no ground exists to sustain the proposition that the judiciary may invoke an implied prohibition, upon the theory that to do so is essential to save such rights from destruction. And the same considerations dispose of the contention based upon the due process clause of the 5th Amendment. That provision, as we have previously said, does not withdraw or expressly limit the grant of power to tax conferred upon Congress by the Constitution. From this it follows, as we have also previously declared, that the judiciary is without authority to avoid an act of Congress exerting the taxing power, even in a case where, to the judicial mind, it seems that Congress had, in putting such power in motion, abused its lawful authority by levying a tax which was unwise or oppressive, or the result of the enforcement of which might be to indirectly affect subjects not within the powers delegated to Congress.

Let us concede that if a case was presented where the abuse of the taxing power was so extreme as to be beyond the principles which we have previously stated, and where it was plain to the judicial mind that the power had been called into play, not for revenue, but solely for the purpose of destroying rights which could not be rightfully destroyed consistently with the principles of freedom and justice upon which the Constitution rests, it would be the duty of the courts to say that such an arbitrary act was not merely an abuse of a delegated power, but was the exercise of an authority not conferred. This concession, however, like the one previously made, must be without influence upon the decision of this cause for the reasons previously stated; that is, that the manufacture of artificially colored oleomargarine may be prohibited by a free government without a violation of fundamental rights.

[Chief Justice Fuller, and Justices Brown and Peckham dissented.]

**b. Child Labor Tax Case**

[*Bailey v. Drexel Furniture Co.* (1922), 259 U. S. 20, 36-38; 66 L. Ed. 817, 819-820.]

Mr. Chief Justice Taft delivered the opinion of the court: . . .

The law is attacked on the ground that it is a regulation of the employment of child labor in the states,—an exclusively state function under the Federal Constitution and within the reservations of the 10th Amendment. It is defended on the ground that it is a mere excise tax, levied by the Congress of the United States under its broad power of taxation conferred by §8, article 1, of the Federal Constitution. We must construe the law and interpret the intent and meaning of Congress from the language of the act. The words are to be given their ordinary meaning unless the context shows that they are differently used. Does this law impose a tax with only that incidental restraint and regulation which a tax must inevitably involve? Or does it regulate by the use of the so-called tax as a penalty? If a tax, it is clearly an excise. If it were an excise on a commodity or other thing of value we might not be permitted, under previous decisions of this court, to infer, solely from its heavy burden, that the act intends a prohibition instead of a tax. But this act is more. It provides a heavy exaction for a departure from a detailed and specified course of conduct in business. That course of business is that employers shall employ in mines and quarries, children of an age greater than sixteen years; in mills and factories, children of an age greater than fourteen years; and shall prevent children of less than sixteen years in mills and factories from working more than eight hours a day or six days in the week. If an employer departs from the prescribed course of business, he is to pay to the government one tenth of his entire net income in the business for a full year. The amount is not to be proportioned in any degree to the extent or frequency of the departures, but is to be paid by the employer in full measure whether he employs five hundred children for a year, or employs only one for a day. Moreover, if he does not know the child is within the named age limit, he is not to pay; that is to say, it is only where he knowingly departs from the prescribed course that payment is to be exacted. Scien-ters are associated with penalties, not with taxes. The employer's factory is to be subject to inspection at any time not only by the taxing officers of the Treasury, the Department normally charged with the collection of taxes, but also by the Secretary of Labor and his subordinates, whose normal function is the advancement and protection of the welfare of the workers. In the light of these features of the act, a



court must be blind not to see that the so-called tax is imposed to stop the employment of children within the age limits prescribed. Its prohibitory and regulatory effect and purpose are palpable. All others can see and understand this. How can we properly shut our minds to it?

It is the high duty and function of this court in cases regularly brought to its bar to decline to recognize or enforce seeming laws of Congress, dealing with subjects not intrusted to Congress, but left or committed by the supreme law of the land to the control of the states. We cannot avoid the duty even though it require us to refuse to give effect to legislation designed to promote the highest good. The good sought in unconstitutional legislation is an insidious feature because it leads citizens and legislators of good purpose to promote it without thought of the serious breach it will make in the ark of our covenant, or the harm which will come from breaking down recognized standards. In the maintenance of local self-government, on the one hand, and the national power, on the other, our country has been able to endure and prosper for nearly a century and a half.

Out of a proper respect for the acts of a co-ordinate branch of the government, this court has gone far to sustain taxing acts as such, even though there has been ground for suspecting, from the weight of the tax, it was intended to destroy its subject. But in the act before us, the presumption of validity cannot prevail, because the proof of the contrary is found on the very face of its provisions. Grant the validity of this law, and all that Congress would need to do hereafter, in seeking to take over to its control any one of the great number of subjects of public interest, jurisdiction of which the states have never parted with, and which are reserved to them by the 10th Amendment, would be to enact a detailed measure of complete regulation of the subject and enforce it by a so-called tax upon departures from it. To give such magic to the word "tax" would be to break down all constitutional limitation of the powers of Congress and completely wipe out the sovereignty of the states.

The difference between a tax and a penalty is sometimes difficult to define, and yet the consequences of the distinction in the required method of their collection often are important. Where the sovereign enacting the law has power to impose both tax and penalty, the difference between revenue production and mere regulation may be immaterial; but not so when one sovereign can impose a tax only, and the power of regulation rests in another. Taxes are occasionally imposed in the discretion of the legislature on proper subjects with the primary motive of obtaining revenue from them, and with the incidental motive of



discouraging them by making their continuance onerous. They do not lose their character as taxes because of the incidental motive. But there comes a time in the extension of the penalizing features of the so-called tax when it loses its character as such and becomes a mere penalty, with the characteristics of regulation and punishment. Such is the case in the law before us. Although Congress does not invalidate the contract of employment, or expressly declare that the employment within the mentioned ages is illegal, it does exhibit its intent practically to achieve the latter result by adopting the criteria of wrongdoing, and imposing its principal consequence on those who transgress its standard. . . .

Mr. Justice Clarke dissents.

## 94. THE BUDGET SYSTEM

Until 1921, the finances of the national government were conducted in a somewhat haphazard manner, without any appreciable coordination between income and expenditure, and without any clear responsibility for the efficient and economical operation of all the government services. The adoption of a budget system had been proposed for some time, and in 1920 a budget bill was passed by Congress. President Wilson, although a life-long advocate of the budget system, vetoed this bill on constitutional grounds, and the installation of such a system was therefore postponed until 1921, when Congress passed and President Harding approved, the so-called Budget and Accounting Act. Under the vigorous administration of General Dawes, who became the first Director of the Budget, economies were immediately effected and the budget system established on a firm basis. In 1939, President Roosevelt, acting under the authority of the Reorganization Act, transferred the Bureau of the Budget from the Treasury Department to the White House Office, thus emphasizing its position as the agent of the President in the preparation of the budget.

[Budget and Accounting Act of 1921. *U. S. Statutes at Large*, vol. 42, pp. 20-27.]

CHAP. 18.—An Act to provide a national budget system and an independent audit of Government accounts, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

### TITLE I. DEFINITIONS

SECTION 1. This act may be cited as the "budget and accounting act, 1921."

SEC. 2. When used in this act—

The terms "department and establishment" and "department or establishment" mean any executive department, independent commission,

board, bureau, office, agency, or other establishment of the Government, including the municipal government of the District of Columbia, but do not include the legislative branch of the Government or the Supreme Court of the United States; . . .

## TITLE II. THE BUDGET

SEC. 201. The President shall transmit to Congress on the first day of each regular session the budget, which shall set forth in summary and in detail:

(a) Estimates of the expenditures and appropriations necessary, in his judgment, for the support of the Government for the ensuing fiscal year; except that the estimates for such year for the legislative branch of the Government and the Supreme Court of the United States shall be transmitted to the President on or before October 15 of each year, and shall be included by him in the budget without revision;

(b) His estimates of the receipts of the Government during the ensuing fiscal year, under (1) laws existing at the time the budget is transmitted, and also (2) under the revenue proposals, if any, contained in the budget;

(c) The expenditures and receipts of the Government during the last completed fiscal year;

(d) Estimates of the expenditures and receipts of the Government during the fiscal year in progress;

(e) The amount of annual, permanent, or other appropriations, including balances of appropriations for prior fiscal years, available for expenditure during the fiscal year in progress, as of November 1 of such year;

(f) Balanced statements of (1) the condition of the Treasury at the end of the last completed fiscal year, (2) the estimated condition of the Treasury at the end of the fiscal year in progress, and (3) the estimated condition of the Treasury at the end of the ensuing fiscal year, if the financial proposals contained in the budget are adopted;

(g) All essential facts regarding the bonded and other indebtedness of the Government; and

(h) Such other financial statements and data as in his opinion are necessary or desirable in order to make known in all practicable detail the financial condition of the Government. . . .

SEC. 207. There is hereby created in the Treasury Department a bureau to be known as the bureau of the budget. There shall be in the bureau a director and an assistant director, who shall be appointed

by the President and receive salaries of \$10,000 and \$7,500 a year, respectively. . . . The bureau, under such rules and regulations as the President may prescribe, shall prepare for him the budget, the alternative budget, and any supplemental or deficiency estimates, and to this end shall have authority to assemble, correlate, revise, reduce, or increase the estimates of the several departments or establishments. . . .

SEC. 209. The bureau, when directed by the President, shall make a detailed study of the departments and establishments for the purpose of enabling the President to determine what changes (with a view of securing greater economy and efficiency in the conduct of the public service) should be made in (1) the existing organization, activities, and methods of business of such departments or establishments, (2) the appropriations therefor, (3) the assignment of particular activities to particular services, or (4) the regrouping of services. The results of such study shall be embodied in a report or reports to the President, who may transmit to Congress such report or reports or any part thereof with his recommendations on the matters covered thereby. . . .

SEC. 213. Under such regulations as the President may prescribe, (1) every department and establishment shall furnish to the bureau such information as the bureau may from time to time require, and (2) the director and the assistant director or any employee of the bureau when duly authorized shall, for the purpose of securing such information, have access to, and the right to examine, any books, documents, papers, or records of any such department or establishment.

SEC. 214. (a) The head of each department and establishment shall designate an official thereof as budget officer therefor, who, in each year under his direction and on or before a date fixed by him, shall prepare the departmental estimates.

(b) Such budget officer shall also prepare, under the direction of the head of the department or establishment, such supplemental and deficiency estimates as may be required for its work. \*

SEC. 215. The head of each department and establishment shall revise the departmental estimates and submit them to the bureau on or before September 15 of each year. In case of his failure so to do the President shall cause to be prepared such estimates and data as are necessary to enable him to include in the budget estimates and statements in respect to the work of such department or establishment.

SEC. 216. The departmental estimates and any supplemental or deficiency estimates submitted to the bureau by the head of any department or establishment shall be prepared and submitted in such form, manner, and detail as the President may prescribe. . . .

## TITLE III. GENERAL ACCOUNTING OFFICE

SEC. 301. There is created an establishment of the Government to be known as the general accounting office, which shall be independent of the executive departments and under the control and direction of the comptroller general of the United States. The offices of Comptroller of the Treasury and Assistant Comptroller of the Treasury are abolished, to take effect July 1, 1921. All other officers and employees of the office of the Comptroller of the Treasury shall become officers and employees in the general accounting office at their grades and salaries on July 1, 1921, and all books, records, documents, papers, furniture, office equipment, and other property of the office of the Comptroller of the Treasury shall become the property of the general accounting office. The comptroller general is authorized to adopt a seal for the general accounting office.

SEC. 302. There shall be in the general accounting office a comptroller general of the United States and an assistant comptroller general of the United States, who shall be appointed by the President, with the advice and consent of the Senate, and shall receive salaries of \$10,000 and \$7,500 a year, respectively. . . .

SEC. 303. Except as hereinafter provided in this section, the comptroller general and the assistant comptroller general shall hold office for 15 years. The comptroller general shall not be eligible for reappointment. The comptroller general or the assistant comptroller general may be removed at any time by joint resolution of Congress after notice and hearing, when, in the judgment of Congress, the comptroller general or assistant comptroller general has become permanently incapacitated or has been inefficient, or guilty of neglect of duty, or of malfeasance in office, or of any felony or conduct involving moral turpitude, and for no other cause and in no other manner except by impeachment. Any comptroller general or assistant comptroller general removed in the manner herein provided shall be ineligible for reappointment to that office. When a comptroller general or assistant comptroller general attains the age of 70 years he shall be retired from his office.

SEC. 304. All powers and duties now conferred or imposed by law upon the Comptroller of the Treasury or the six auditors of the Treasury Department, and the duties of the Division of Bookkeeping and Warrants of the office of the Secretary of the Treasury relating to keeping the personal ledger accounts of disbursing and collecting officers, shall, so far as not inconsistent with this act, be vested in and imposed upon the general accounting office and be exercised without direction

from any other officer. The balances certified by the comptroller general shall be final and conclusive upon the executive branch of the Government. . . .

SEC. 305. Section 236 of the revised statutes is amended to read as follows:

"Sec. 236. All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the general accounting office."

. . .

SEC. 309. The comptroller general shall prescribe the forms, systems, and procedure for administrative appropriation and fund accounting in the several departments and establishments, and for the administrative examination of fiscal officers' accounts and claims against the United States. . . .

SEC. 312. (a) The comptroller general shall investigate, at the seat of government or elsewhere, all matters relating to the receipt, disbursement, and application of public funds, and shall make to the President when requested by him, and to Congress at the beginning of each regular session, a report in writing of the work of the general accounting office, containing recommendations concerning the legislation he may deem necessary to facilitate the prompt and accurate rendition and settlement of accounts and concerning such other matters relating to the receipt, disbursement, and application of public funds, as he may think advisable. In such regular report, or in special reports at any time when Congress is in session, he shall make recommendations looking to greater economy or efficiency in public expenditures.

(b) He shall make such investigations and reports as shall be ordered by either House of Congress or by any committee of either House having jurisdiction over revenue, appropriations, or expenditures. The comptroller general shall also, at the request of any such committee, direct assistants from his office to furnish the committee such aid and information as it may request.

(c) The comptroller general shall specially report to Congress every expenditure or contract made by any department or establishment in any year in violation of law.

(d) He shall submit to Congress reports upon the adequacy and effectiveness of the administrative examination of accounts and claims in the respective departments and establishments and upon the adequacy and effectiveness of departmental inspection of the offices and accounts of fiscal officers.

(e) He shall furnish such information relating to expenditures and accounting to the bureau of the budget as it may request from time to time.

SEC. 313. All departments and establishments shall furnish to the comptroller general such information regarding the powers, duties, activities, organization, financial transactions, and methods of business of their respective offices as he may from time to time require of them; and the comptroller general, or any of his assistants or employees, when duly authorized by him, shall for the purpose of securing such information have access to and the right to examine any books, documents, papers, or records of any such department or establishment. . . .

Approved, June 10, 1921.

## 95. POWERS AND POSITION OF THE COMPTROLLER GENERAL

As indicated in previous selections, there was established together with the budget system the General Accounting Office, under the direction of the Comptroller General. The independent and powerful position accorded to this officer, and the vigor with which the first Comptroller General (J. R. McCarl) administered the functions of his office, led to several clashes with other high officials as to the control of funds appropriated to particular departments. In 1937 the President's Committee on Administrative Management recommended important changes in the accounting system, and President Roosevelt strongly supported these proposals. However, Congress refused to pass the necessary legislation in this respect, and the office of Comptroller General continues as established in 1921.

### a. Statement by Comptroller General McCarl

[*Annual Report of the Comptroller General of the United States, 1927*, pp. iii-vi.]

There are few of the manifold activities of the United States that may be carried on without the use of public money. The Congress, as the direct representatives of the people, is not only the sole lawmaking power of the United States, but it has, in trust, the exclusive power under Article I, section 8, of the Constitution to raise public money by means of taxes and customs duties, and the exclusive power under section 9 of that article to appropriate same for the conduct of the activities of the Government.

The retention, by the American people, of this control over the raising and spending of moneys for the common benefit was effected by placing this power in the hands of their direct representatives, who are required,



at intervals, to render to them an account of the discharge of such stewardship. The provisions in the Constitution for such retention of power combine the best principles of the pure democracy of the ancient city states, the New England township, and the efficiency of a highly centralized Government. The people, in Congress, have the exclusive authority to grant or to withhold public funds for public uses, and to grant such funds with such limitations or special directions as they may determine to be wise. By means of such control over public money, the people, in Congress, may exercise effective control over their Government, and may expand or contract its activities, and the activities of their more or less permanent officials as is deemed necessary or desirable.

The Congress learned during the early days of its existence, as the Parliament of England theretofore had learned, that it was necessary to prescribe with more or less particularity the method by which taxes or customs should be collected, and the purpose for which appropriated money might be used by officers of the executive branch of the Government. However, investigations into the actual conduct of executive officers in the discharge of the activities with which they were charged by law disclosed that the directions in the statutes, prepared with infinite pains and after far-reaching examination and most careful consideration, were not always observed. Albert Gallatin, a member of the early House of Representatives and the fourth Secretary of the Treasury, succeeded in having enacted into law a provision which is now section 3678, Revised Statutes, as follows:

All sums appropriated for the various branches of expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others.

When the Congress has appropriated money for a specific purpose, it can not be admitted, under existing law, that the moneys appropriated for one purpose may be diverted to some other purpose excepting by the Congress collectively assembled itself first so authorizing. It is exclusively a legislative right and if sought to be elsewhere exercised would be legislating by other than the constitutional body and strike at the root of representative government, failing not only to observe the limitations and directions contained in the statutes making the appropriations or for their expenditure, but disregarding the general and expressed inhibition in statutory law against the diversion of public funds.

There have been recent occurrences presenting emergency conditions of such character that the Congress, if in session, would probably have granted assistance through special appropriation of public funds. The conditions were not entirely local but more extensive, involving a suffi-

ciently widespread territory to be appealing to the country. It is referred to here because of the emergency situation that arises and demands prompt consideration—and so that it may be considered before a recurrence again precipitates the dilemma of observing the law or action in disregard of lawful control of money expenditures. The assistance of the United States usually demanded and needed involves money expenditure. This always must be met by the question of appropriation. It is the lexicon of Government money uses that the Constitution prohibits the withdrawal of money from the Treasury except in consequence of appropriation by law—and, paralleling that, are the statutory provisions that appropriations must be applied solely to the object for which made. There is not, nor so far as can now be ascertained there has not been, any permanent appropriation for emergency conditions, nor has there been heretofore given any permanent authority to anyone to apply moneys to any other object than that for which made by the law of the appropriation. This leads to inquiries when catastrophes arise demanding aid of the United States, possibly justified, may moneys having in some instances a possible relation thereto be applied to other than the specific purpose, or must there be insisted on the letter of the law and the moneys be not applied otherwise than the clear letter of the law states. My duty therein is unquestioned, and I have without hesitation not given sanction to any proposition that purposed to divert the moneys from the clear appropriation purposes to the needs engendered by the catastrophic occurrence. For the accounting officers to have agreed to the course, even though unquestionably emergency conditions prevailed, would have been utter disregard of clear duty, for there has been as yet not entrusted to them for the doing alone or in conjunction with others the authority to divert appropriated funds. Whether there exists need for the Congress to grant such authority, or whether it may be without seriously diminishing the control of the Congress and the responsibility there for the uses of the public moneys so clearly contemplated by the Constitution, are questions for the Congress.

There is another phase of the matter proper for mention here. It is this. Under our present disbursing system, the frailties of which were attempted to be pointed out in my last annual report, which permits administratively controlled disbursing officers to draw funds from the Treasury and make uses thereof, even in disregard of applicable decisions of the accounting officers, there is strong inducement for administrative officers to overlook the law to meet emergency conditions appealing to them as worthy, and rely upon the popularity of the cause to later obtain congressional approval of the unlawful expenditures. It

appears a most serious matter that our system for disbursing public funds continues such as to so persuade administrative officials to violate a cardinal principle of the Constitution. If our form of government is to endure the law must control.

It seems necessary and timely that the situation be thus pointed out, so there may be understood the duty of the accounting officers in such matters under existing laws, the lure that lies in our present disbursing system, and the need for additional legislation if the Congress wishes to give authority to use in connection with emergencies occurring during periods of recess funds appropriated for other purposes.

The practical work of representative government in England, France, and the Dominion of Canada, as well as in the United States, has demonstrated the fact that limitations and directions in the statutes for the expenditure of public funds are not sufficient to insure the observance thereof. There must be some central organization to superintend, for the legislative bodies, the accounting for public money; that is, to prevent, so far as possible, the use of public money for unauthorized purposes, and to report to the legislative bodies such unauthorized uses as are not prevented. The necessity for a central organization arises because the changing character of representative assemblies does not permit such degree of familiarity and experience with the fiscal laws of the country as to enable their members to perform all of the many details required in accounting for public money; also, because such members must devote a major share of their attention to the actual work of legislation, although both the legislative assemblies of England and the Dominion of Canada established committees on accounts, wherein are considered the recommendations and reports of their respective chief accounting officers, and any claims for reduction of the number of disbursing and accountable officers from 1,000 or more to approximately 50.

While the expenditure of public money, after same has been appropriated, or the collection thereof in accordance with revenue-producing statutes, may be considered an executive function, it is believed that the history of representative assemblies in Anglo-Saxon countries, at least, demonstrates that accounting for such funds is a legislative function. Otherwise the officers who actually expend the money would account to themselves and thus the Congress could not prevent them from making expenditures from appropriated moneys for unauthorized purposes and would be without information, necessary, in future legislation, as to the purposes for which the expenditures were actually made.

The Budget and Accounting Act of 1921 marked a return to the early practice in this country of making the chief accounting officer responsible

directly to the Congress and independent of all direction from executive officers of the Government. Responsibility and independence from executive control align the position of the chief accounting officer of the United States to that of his counter-parts, even in parliamentary countries where the executive officers are themselves members of the legislative assemblies and responsible thereto for their acts. As executive officers in this country are members of the executive branch of the Government, and not subject to the control of the Congress except by impeachment, the wonder of it is that the chief accounting officer was ever made a part of the executive branch of the Government, as he was during the period from 1789 to 1921, when an officer of the Treasury Department.

It may be this was due to the fact that during such intervening period the revenue statutes produced an abundance of revenue, and there was little necessity for economy in the expenditure of public funds. After our entry into the World War, with its large increase in the public debt, and subsequent expansion of governmental activities, such as aid to public roads, maternity act, and various other forms of aid to the States, internal revenue taxation reached such rates that there was public demand for their reduction and for a greater degree of economy in the expenditure of funds. The tightening up in the Budget and Accounting Act of 1921 of legislative control over the expenditures of public money was doubtless aided by a growing realization on the part of the executive officers that there could be no better testimony of the faithful discharge of their duties than a full and complete accounting to the legislative branch of the Government for the expenditure of public funds entrusted to them.

I am happy to report to the Congress that as this phase of the matter becomes better understood by the chief officers of the executive branch of the Government there has been more of cooperation and willingness, not only fully to account for the expenditure of public funds, but to secure the advice of this office by means of decisions in advance of incurring obligations as to whether the Congress had actually authorized the contemplated obligation.

#### **b. Recommendations of the President's Committee**

[*Report of the President's Committee on Administrative Management*  
(Jan., 1937), pp. 20-24.]

### **B. DIRECTION AND CONTROL OF ACCOUNTING AND EXPENDITURES**

A second important phase of fiscal management is the direction and control of expenditures through the system of accounting. The present

accounting system of the Government is badly scattered and presents a rather incongruous mixture of antique and modern practices. Essential parts of the system are now found in the Treasury Department, divided among three or four important Treasury units, in the General Accounting Office, and in the various operating bureaus, departments, and establishments. At the same time, the warrant procedure that dates back to Alexander Hamilton's day pursues its plodding way alongside the latest machine bookkeeping. Financial reporting from the various accounts is far from being systematized, is generally lacking in telling information for administrative purposes, and is often delayed beyond the point of any practical value.

Although the Budget and Accounting Act of 1921 had as one of its main objects the improvement of the Government's accounting system, very little of real and lasting value has as yet resulted. The Comptroller General was vested with authority under this act to prescribe a system of administrative appropriation and fund accounting in the several departments and establishments. Fifteen years have since elapsed, and still no comprehensive and adequate system of general accounts has been developed by the Comptroller General's office.

The authority which the Comptroller General has exercised over departmental accounting procedures has, in many cases, improved the accounts in the departments and establishments. But these procedures have continually stressed the bringing of accounting information into the General Accounting Office, with little consideration for the informational needs of the Bureau of the Budget, of the Treasury Department, and ultimately of the President. The tendency, therefore, has been to deprive the Executive of adequate accounting machinery, or even authority to develop this important instrument of financial direction. Because of the lack of interest in administration little effort has been made, for example, toward the development of unit or cost accounts. It is very doubtful if the Congress intended that the accounting provision of the 1921 Act should work in this way. Certainly it is inconsistent with Executive responsibility and efficient administration.

The time is ripe for a return to the basic notion that served as the groundwork for the original accounting system of the Government. There should now be installed in the Treasury Department a modern system of general accounting and reporting that would produce accurate information quickly and easily concerning expenditure obligations, appropriation and allotment balances, revenue estimates and accruals, and actual collections, as well as cash disbursements and receipts. Not only should the accounting methods be standardized throughout the govern-



mental agencies, but there should be a complete revamping of the accounting procedure which would enable the Treasury Department to secure reliable information at a moment's notice on the status of all revenues and expenditures of the Government. There is abundant evidence that these accounting improvements are greatly needed, and that they can now be properly made.

#### CURRENT CONTROL OF EXPENDITURES

Through the accounting system current control over expenditures is exercised. This function is often confused with the function of audit. Current control involves final decisions as to proposed expenditures and the availability of funds. An audit is an examination and verification of the accounts after transactions are completed in order to discover and report to the legislative body any unauthorized, illegal, or irregular expenditures, any financial practices that are unsound, and whether the administration has faithfully discharged its responsibility.

A true audit can be conducted only by other officers than those charged with the making of decisions upon expenditures. No public officer should be authorized to audit his own accounts or financial acts and decisions. The maximum safeguard is provided when the auditor is entirely independent of the administration and exercises no executive authority. The control of expenditures is essentially an executive function, whereas the audit of such expenditures should be independent of executive authority or direction.

Although the title of the Budget and Accounting Act indicates that the principal purpose was to provide a budget system and "an independent audit of public accounts," the distinction between "control" and "audit" was confused in the act. It placed certain control functions, as well as the auditing function, in the Office of the Comptroller General, who was thus made both a "comptroller" and an "auditor." This has created an undesirable and anomalous situation: As an auditor the Comptroller General properly performs his function without the direction of any executive officer; but as a comptroller, exercising the executive authority to determine the uses of appropriations, to settle accounts and claims, and to prescribe administrative accounting systems—functions which are universally recognized as executive in character—he is improperly removed from any executive direction and responsibility.

Furthermore, the Comptroller General, as a comptroller, determines in advance the legality of expenditures and issues rules and regulations which govern the administrative procedures and practices of the execu-



tive establishments; later, as an auditor, he reviews and audits the action taken under his own previous decisions. The more the Comptroller General exercises control over expenditures through advance decisions, approval of contracts, preaudits, and otherwise, the less competent he becomes to audit them. This system results in divided authority and responsibility for the proper expenditure of public funds and the accounting therefor; it deprives the President of essential power needed to discharge his major executive responsibility. Equally important, it deprives the Congress of a really independent audit and review of the fiscal affairs of the Government by an official who has no voice in administrative determinations, which audit is necessary to hold the Administration accountable.

The removal from the Executive of the final authority to determine the uses of appropriations, conditions of employment, the letting of contracts, and the control over administrative decisions, as well as the prescribing of accounting procedures and the vesting of such authority in an officer independent of direct responsibility to the President for his acts, is clearly in violation of the constitutional principle of the division of authority between the Legislative and Executive Branches of the Government. It is contrary to article II, section 3, of the Constitution, which provides that the President "shall take Care that the Laws be faithfully executed."

In the recent case of *Springer v. Philippine Islands* (277 U. S. 189), which involved an attempt to vest executive powers in a legislative body, the Supreme Court declared:

Legislative power, as distinguished from executive power, is the authority to make laws, but not to enforce them or appoint the agents charged with the duty of such enforcement. The latter are executive functions.

The settlement of accounts and the supervision of administrative accounting systems are executive functions; under the Constitution they belong to the Executive Branch of the Government. The audit, by the same reasoning, should operate under legislative direction. The Comptroller General today straddles both positions.

Prior to the adoption of the Budget and Accounting Act of 1921, accounts and claims were settled by the auditors, all of whom were Treasury officials, and the accounting procedures were prescribed by the Comptroller of the Treasury. Strictly speaking, there was no independent audit. When the Congress adopted legislation providing for a National Budget system in 1921, it also provided for an independent auditing office. The hearings on the act, as well as the language of the

act itself, indicate clearly that the purpose in creating an independent auditing office was to enable the Congress to secure adequate and full information upon the finances of the Government. Members of the special committees of the House and the Senate complained that the auditors and the Comptroller of the Treasury, being a part of the administration and subject to removal, would not come before congressional committees and criticize the existing financial practices.

Major attention at that time was focused upon the provisions of the act relating to the creation of a National Budget; the far-reaching implications involved in placing the accounting and controlling authority in an auditing officer independent of the Executive were not clearly realized. There was, however, no lack of warning on this point. During the hearings on the act, in 1919, a number of outstanding witnesses who advocated the creation of an independent auditor stated that he should be charged with the sole task of auditing expenditures after they were made and reporting the results of the audit to the Congress. These witnesses expressed grave doubt as to the wisdom of giving to this independent auditing officer the controlling function as well, for this they regarded as unquestionably executive in character. Among those who called attention to this important distinction were men like former Governor Frank O. Lowden of Illinois, Senator Carter Glass (then Secretary of the Treasury), President Frank J. Goodnow of the Johns Hopkins University, President Nicholas Murray Butler of Columbia University, Mr. John T. Pratt, President of the National Budget Committee, Mr. Henry L. Stimson, later Secretary of State, and Dr. Frederick A. Cleveland.

At various times in the hearings, members of both the House and the Senate committees expressed their own doubts concerning the wisdom of granting controlling and accounting authority to an independent auditor. But the final act transferred to the Comptroller General all the powers formerly exercised by the auditors and by the Comptroller of the Treasury.

#### RESULTS OF INDEPENDENT CONTROL

The results of placing executive powers of control in an independent auditing office may be reviewed briefly. Before 1921, when the head of a department questioned a ruling the Comptroller of the Treasury, or when the President requested it, the ruling was referred to the Attorney General for a legal opinion. Since 1921 this practice has been discontinued. An impasse has resulted. The first Comptroller General of

the United States consistently refused to submit any disputed question to the Attorney General or to modify any of his rulings in conformance with the opinions of the Attorney General. It is significant that the Attorney General has been sustained repeatedly when the issues were taken to courts of law.

Both the Attorney General and the Comptroller General are directed by the Congress to render opinions or decisions interpreting the meaning of congressional acts. Executive officers customarily turn to the Attorney General when there is any question about the authority or the legality of an action which they are contemplating. The present conflict of authority between these two officers leads to a great deal of uncertainty, delay, and expense, and at times reaches almost to the point of administrative paralysis. Speed, decision, vigor, and common sense in the conduct of national affairs have been subordinated to technical rulings on doubtful questions.

The virtual discontinuance of the practice of referring disputed rulings to the Attorney General for an opinion upon legal issues results in the Comptroller General interpreting his own jurisdiction and the scope of his authority through his own rulings. This is an extraordinary principle, clearly contrary to our political institutions and constitutional theory.

Before 1921 there was comparatively little complaint that the rulings of the Comptroller of the Treasury, precursor of the Comptroller General, encroached upon administrative discretion. This was probably because the Comptroller of the Treasury was a part of the administration itself, even though he had semi-independent status, and because of the practice of referring disputed questions to the Attorney General. From 1921 on, however, the Comptroller General, through numerous rulings, has carried his authority into areas which are clearly in the realm of executive decision. Any volume of the published rulings of the Comptroller General affords a wide variety of examples of this invasion of administrative responsibility. Many of his rulings go far beyond the terms of any statute.

Rulings by an independent auditing officer in the realm of executive action and methods, even when they seem wise and salutary, have a profoundly harmful effect. They dissipate executive responsibility and precipitate executive uncertainty. Many of the rulings of the Comptroller General, though issued in the belief that they are in the interest of strict legality, undoubtedly impede the work of the departments and add to their operating costs. Administrative officers have found it necessary to go not merely to their superior officers for the approval

of plans but also to the office of Comptroller General for the approval of legality, form, and procedure. This division of authority destroys responsibility and produces delays and uncertainty. It has become increasingly difficult, and at times simply impossible, for the Government to manage its business with dispatch, with efficiency, and with economic sagacity.

An effective continuing executive control over the administration of the Government to insure economy, legality, and expedition is impossible so long as such wide authority over plans, forms, and procedures is exercised by the General Accounting Office. The Comptroller General has also extended his authority into administrative matters by the expansion of the preaudit (i. e., audit before payment), by the increased use of advance decisions, and by his rulings, all of which have constantly brought more and more administrative questions to him for final determination. The operating plans of the administration are greatly affected, and sometimes controlled, by his rulings. Fiscal practices are to a large extent governed by his decisions. These are areas of control that are customarily entrusted to executive officers, both in Government and in private business administration.

Numerous delays in administration are inevitable under the current procedures and routines of the General Accounting Office. Every voucher must be examined and passed upon in a single office at the seat of the Government. Final settlements are delayed from a period of 3 months to as long as 3 years after the original transaction has been consummated. Of what value to the Congress or to the administration is an audit which is not completed until after 3 years? Executive officers are unable to obtain accurate current reports on the financial status of their own departments or bureaus. The delay in the audit has also created much uncertainty as to the authority of executive officers, with consequent delay in administrative action. Delays are often expensive. Promptness is essential to vigorous, decisive, and efficient public administration.

#### AUDIT OF EXPENDITURES

The General Accounting Office has failed to achieve an independent audit of national expenditures. It has not supplied the Congress with the comprehensive information concerning the financial administration of the Government which an audit should render. The Budget and Accounting Act provides that the Comptroller General shall report to the Congress the results of his audit and his investigations into the financial transactions of the Government and states that he "shall specifically re-

port to Congress every expenditure or contract made by any department or establishment in any year in violation of law." Except in a few isolated cases the Comptroller General has not carried out this provision of the act. He has rarely called attention to unwise expenditures or unsound fiscal practices. Since the present arrangement delays the final settlement of accounts, in some cases for as long as 3 years, it is impossible for the Comptroller General even to complete his audit of any fiscal year in time for it to be of any material value to the Congress.

The fundamental reason why the Comptroller General has failed to provide the Congress with a complete, detailed, and critical audit of the fiscal accounts of the Government, however, is the anomalous and inconsistent position of his office.

The results of the vesting of important executive authority in the Comptroller General, an independent officer, who is not responsible to the Chief Executive, nor, in fact, to the Congress or to the courts, are serious. Effective and responsible management of the executive departments is impossible as long as this unsound and unconstitutional division of executive authority continues. At the same time, the Congress is unable to secure a truly independent audit, which is essential if it is to hold the administration to a strict accountability.

#### RECOMMENDATIONS

Our recommendations regarding the direction and control of accounting and expenditures are as follows:

1. For the purpose of providing the Chief Executive with the essential vehicles for current financial management and administrative control, the authority to prescribe and supervise accounting systems, forms, and procedures in the Federal establishments should be transferred to and vested in the Secretary of the Treasury. This recommendation is not new. In 1932 President Hoover recommended to the Congress that the power to prescribe accounting systems be transferred to the Executive Branch, stating:

It is not, however, a proper function of an establishment created primarily for the purpose of auditing Government accounts to make the necessary studies and to develop and prescribe accounting systems involving the entire field of Government accounting. Neither is it a proper function of such an establishment to prescribe the procedure for nor to determine the effectiveness of the administrative examination of accounts. Accounting is an essential element of effective administration, and it should be developed with the primary objective of serving this purpose.



In 1934 a special committee of the United States Chamber of Commerce on Federal expenditures, headed by Mr. Matthew S. Sloan, recommended that all accounting activities be removed from the Comptroller General and placed in a General Accounting Office directly responsible to the President. This committee stated in its report:

Since the Comptroller General is not under Executive control, as he reports to Congress and is responsible only to that body, the Executive is deprived of one of the most essential means of establishing effective supervision over expenditures, namely, a satisfactory accounting system directly under Executive control. Moreover, the Comptroller General is now in the anomalous position of auditing his own accounting.

The Committee is convinced that accounting should be segregated from auditing, and that accounting should be centralized in an agency under the control of the President. Such a system would provide the administration with machinery necessary to establish control over expenditures and also afford Congress an independent agency for checking the fiscal operations of the administration.

2. For the purpose of fixing responsibility for the fiscal management of the Government establishment on the Chief Executive in conformity with the constitutional principle that the President "shall take Care that the Laws be faithfully executed," claims and demands by the Government of the United States or against it and accounts in which the Government of the United States is concerned, either as debtor or as creditor, should be settled and adjusted in the Treasury Department.

3. To avoid conflict and dispute between the Secretary of the Treasury and the departments as to the jurisdiction of the Secretary to settle public accounts, which conflicts and disputes have so marred the relationship between the Comptroller General and the departments in the past, and to make it impossible for the Secretary of the Treasury to usurp any of the powers vested in the heads of departments by the Congress, the Attorney General should be authorized to render opinions on such questions of jurisdiction (but not on the merits of the case) upon the request of the head of the department or upon the request of the Secretary of the Treasury, and the opinion of the Attorney General on such questions of jurisdiction should be final and binding.

4. In order to conform to the limitations in the functions remaining within the jurisdiction of the Comptroller General, the titles of the Comptroller General and the Assistant Comptroller General should be changed to Auditor General and Assistant Auditor General, respectively, and the name of the General Accounting Office should be changed to the General Auditing Office.



5. The Auditor General should be authorized and required to assign representatives of his office to such stations in the District of Columbia and the field as will enable them currently to audit the accounts of the accountable officers, and they should be required to certify forthwith such exceptions as may be taken to the transactions involved (a) to the officer whose account is involved; (b) to the Auditor General; and (c) to the Secretary of the Treasury.

The auditing work would thus proceed in a decentralized manner independent of, but practically simultaneous with, disbursement. Duplication of effort and delays due to centralization in Washington could be reduced to a minimum. It would not be necessary for the Treasury Department to duplicate the field audit of the General Auditing Office. Exceptions would be promptly reported to the Treasury. Prompt, efficient service could be afforded in the scrutiny of questioned vouchers and in the review of accounts of disbursing officers.

6. In the event of the failure of the Secretary of the Treasury and the Auditor General to reach an agreement with respect to any exception reported by representatives of the Auditor General concerning any expenditure, it should be the duty of the Auditor General to report such exception to the Congress through such committees or joint committees as the Congress may choose to designate.

## CHAPTER XVI

### REGULATION OF COMMERCE

#### 96. SCOPE OF COMMERCE POWER

The term "commerce," as used in the Constitution, is not in itself clear, but has been construed by the courts on numerous occasions, and particularly in the case of *Gibbons v. Ogden*. Robert Livingston and Robert Fulton had been given by the state of New York the monopoly of steam-boat navigation within that state, and had later sold their rights to Aaron Ogden. Meanwhile Thomas Gibbons, a citizen of New Jersey, acting under license from the federal government, began to operate a ferry from Elizabethtown, New Jersey, to New York City. Ogden thereupon secured an injunction from the New York courts, restraining Gibbons from operating the ferry, but on appeal the New York courts were overruled, the act of Congress was held to be of superior obligation, and the term "commerce" was given such a broad interpretation as greatly to enhance the power of Congress. Later (in 1878), the Supreme Court still further increased the power of Congress over commerce by its "expanding" interpretation of the Constitution.

##### a. Meaning of Commerce

[*Gibbons v. Ogden* (1824), 9 Wheat. 1, 186-197; 6 L. Ed. 23, 67-70.]

Mr. Chief Justice Marshall delivered the opinion of the Court, . . .

The appellant contends that this decree is erroneous, because the laws which purport to give the exclusive privilege it sustains, are repugnant to the constitution and laws of the United States. . . .

The subject to be regulated is commerce; and our constitution being, as was aptly said at the bar, one of enumeration, and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and do not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse. The mind can scarcely conceive a system for regulating commerce between nations, which shall exclude all laws concerning navigation, which shall be silent on the admission of the vessels of the

one nation into the ports of the other, and be confined to prescribing rules for the conduct of individuals, in the actual employment of buying and selling or of barter.

If commerce does not include navigation, the government of the Union has no direct power over that subject, and can make no law prescribing what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the government, has been exercised with the consent of all, and has been understood by all to be a commercial regulation. All America understands, and has uniformly understood, the word "commerce" to comprehend navigation. It was so understood, and must have been so understood, when the constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their government, and must have been contemplated in forming it. The convention must have used the word in that sense; because all have understood it in that sense, and the attempt to restrict it comes too late. . . .

The word used in the constitution, then, comprehends, and has been always understood to comprehend, navigation within its meaning; and a power to regulate navigation is as expressly granted as if that term had been added to the word "commerce." . . .

We are now arrived at the inquiry, What is this power?

It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution. These are expressed in plain terms, and do not affect the questions which arise in this case, or which have been discussed at the bar. If, as has always been understood, the sovereignty of Congress, though limited to specified objects, is plenary as to those objects, the power over commerce with foreign nations, and among the several States, is vested in Congress as absolutely as it would be in a single government, having in its constitution the same restrictions on the exercise of the power as are found in the constitution of the United States. The wisdom and the discretion of Congress, their identity with the people, and the influence which their constituents possess at election, are, in this, as in many other instances, as that, for example, of declaring war, the sole restraints on which they have relied, to secure them from its abuse. They are the restraints on which the people must often rely solely, in all representative governments.

The power of Congress, then, comprehends navigation within the limits of every state in the Union; so far as that navigation may be, in any manner, connected with "commerce with foreign nations, or among the several states, or with the Indian tribes." It may, of consequence, pass the jurisdictional line of New York, and act upon the very waters to which the prohibition now under consideration applies. . . .

### b. Doctrine of Expanding Power

[*Pensacola Telegraph Co. v. Western Union Telegraph Co.* (1878), 96 U. S. 1, 9-10; 24 L. Ed. 708, 710-711.]

Mr. Chief Justice Waite delivered the opinion of the Court. . . .

Since the case of *Gibbons v. Ogden* (9 Wheat. 1), it has never been doubted that commercial intercourse is an element of commerce which comes within the regulating power of Congress. Post-offices and post-roads are established to facilitate the transmission of intelligence. Both commerce and the postal service are placed within the power of Congress, because, being national in their operation, they should be under the protecting care of the national government.

The powers thus granted are not confined to the instrumentalities of commerce, or the postal system known or in use when the Constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of times and circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth. They were intended for the government of the business to which they relate, at all times and under all circumstances. As they were entrusted to the general government for the good of the nation, it is not only the right, but the duty, of Congress to see to it that intercourse among the States and the transmission of intelligence are not obstructed or unnecessarily encumbered by State legislation.

The electric telegraph marks an epoch in the progress of time. In a little more than a quarter of a century it has changed the habits of business, and become one of the necessities of commerce. It is indispensable as a means of inter-communication, but especially is it so in commercial transactions. The statistics of the business before the recent reduction in rates show that more than eighty per cent of all the messages sent by telegraph related to commerce. Goods are sold and money

paid upon telegraphic orders. Contracts are made by telegraphic correspondence, cargoes secured, and the movement of ships directed. The telegraphic announcement of the markets abroad regulates prices at home, and a prudent merchant rarely enters upon an important transaction without using the telegraph freely to secure information.

It is not only important to the people, but to the government. By means of it the heads of departments in Washington are kept in close communication with all their various agencies at home and abroad, and can know at almost any hour, by inquiry, what is transpiring anywhere that affects the interest they have in charge. Under such circumstances, it cannot for a moment be doubted that this powerful agency of commerce and inter-communication comes within the controlling power of Congress, certainly, as against hostile State legislation. In fact, from the beginning, it seems to have been assumed that Congress might aid in developing the system; for the first telegraph line of any considerable extent ever erected was built between Washington and Baltimore, only a little more than thirty years ago, with money appropriated by Congress for that purpose (5 Stat. 618); and large donations of land and money have since been made to aid in the construction of other lines (12 Stat. 489, 772; 13 id. 365; 14 id. 292). It is not necessary now to inquire whether Congress may assume the telegraph as part of the postal service, and exclude all others from its use. The present case is satisfied, if we find that Congress has power, by appropriate legislation, to prevent the States from placing obstructions in the way of its usefulness.

The government of the United States, within the scope of its powers, operates upon every foot of territory under its jurisdiction. It legislates for the whole nation, and is not embarrassed by State lines. Its peculiar duty is to protect one part of the country from encroachments by another upon the national rights which belong to all. . . .

## 97. RULE OF REASON

The Sherman Anti-Trust Act, passed in 1890, declared illegal "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations"; and imposed criminal penalties for the violation of the act. Acting under this statute, suits were brought in 1906 and 1907 to dissolve the Standard Oil Company of New Jersey and the American Tobacco Company, which were charged with being such illegal monopolies. The lower courts issued decrees of dissolution and were, on appeal, sustained by the Supreme Court. In its opinion on these cases, however, the Supreme Court laid down the so-called "rule of reason," viz., that the act in question must be construed as prohibiting "undue" or "unreasonable" restraints



of trade, and thus making more difficult the problem of enforcing the anti-trust legislation.

[*United States v. American Tobacco Co.* (1911), 221 U. S. 106, 179-180, 192-193; 55 L. Ed. 663, 693-694, 698-699.]

In that case [the Standard Oil Case] it was held, without departing from any previous decision of the court, that as the statute had not defined the words "restraint of trade," it became necessary to construe those words,—a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Asso. and Joint Traffic Cases*, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, and 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25). That such view was a mistaken one was fully pointed out in the Standard Oil Case, and is additionally shown by a passage in the opinion in the Joint Traffic Case, as follows (171 U. S. 568): "The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." Applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that, as the words "restraint of trade" at common law and in the law of this country at the time of the adoption of the anti-trust act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or because of the evident purpose of the acts, etc., injuriously restrained trade, that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term "restraint of trade," required that the words "restraint of trade" should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce—the free movement of which it



was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt. Indeed, the necessity for not departing in this case from the standard of the rule of reason which is universal in its application is so plainly required in order to give effect to the remedial purposes which the act under consideration contemplates, and to prevent that act from destroying all liberty of contract and all substantial right to trade, and thus causing the act to be at war with itself by annihilating the fundamental right of freedom to trade which, on the very face of the act, it was enacted to preserve, is illustrated by the record before us. In truth, the plain demonstration which this record gives of the injury which would arise from, and the promotion of the wrongs which the statute was intended to guard against which would result from, giving to the statute a narrow, unreasoning, and unheard-of construction, as illustrated by the record before us, if possible serves to strengthen our conviction as to the correctness of the rule of construction—the rule of reason—which was applied in the Standard Oil Case, the application of which rule to the statute we now, in the most unequivocal terms, re-express and re-affirm. . . .

Mr. Justice Harlan concurred in part and dissented in part: . . .

If I do not misapprehend the opinion just delivered, the court insists that what was said in the opinion in the Standard Oil Case was in accordance with our previous decisions in the *Trans-Missouri* and *Joint Traffic Cases*, 166 U. S. 290, 41 L. ed. 1007, 17 Sup. Ct. Rep. 540, 171 U. S. 505, 43 L. ed. 259, 19 Sup. Ct. Rep. 25, if we resort to *reason*. This statement surprises me quite as much as would a statement that black was white or white was black. It is scarcely just to the majority in those two cases for the court at this late day to say or to intimate that they interpreted the act of Congress without regard to the "rule of reason," or to assume, as the court now does, that the act was, for the first time, in the Standard Oil Case, interpreted in the "light of reason." One thing is certain, "rule of reason," to which the court refers, does not justify the perversion of the plain words of an act in order to defeat the will of Congress.

By every conceivable form of expression, the majority, in the *Trans-Missouri* and *Joint Traffic Cases*, adjudged that the act of Congress did not allow restraint of interstate trade to any extent or in any form, and three times it expressly rejected the theory, which had been persistently advanced, that the act should be construed as if it had in it the word "unreasonable" or "undue." But now the court, in accordance

with what it denominates the "rule of reason," in effect inserts in the act the word "undue," which means the same as 'unreasonable,' and thereby makes Congress say what it did not say; what, as I think, it plainly did not intend to say; and what, since the passage of the act, it has explicitly refused to say. It has steadily refused to amend the act so as to tolerate a restraint of interstate commerce even where such restraint could be said to be "reasonable" or "due." In short, the court now, by judicial legislation, in effect amends an act of Congress relating to a subject over which that department of the government has exclusively cognizance. I beg to say that, in my judgment, the majority, in the former cases, were guided by the "rule of reason;" for it may be assumed that they knew quite as well as others what the rules of reason require when a court seeks to ascertain the will of Congress as expressed in a statute. It is obvious from the opinions in the former cases, that the majority did not grope about in darkness, but in discharging the solemn duty put on them they stood out in the full glare of the "light of reason," and felt and said, time and again, that the court could not, consistently with the Constitution, and would not, usurp the functions of Congress by indulging in judicial legislation. They said in express words, in the former cases, in response to the earnest contentions of counsel, that to insert by construction the word "unreasonable" or "undue" in the act of Congress would be *judicial legislation*. Let me say, also, that as we all agree that the combination in question was illegal under *any* construction of the anti-trust act, there was not the slightest necessity to enter upon an extended argument to show that the act of Congress was to be read as if it contained the word "unreasonable" or "undue." All that is said in the court's opinion in support of that view is, I say with respect, *obiter dicta*, pure and simple.

## 98. RELATION BETWEEN INTERSTATE AND INTRASTATE COMMERCE

The Constitution seems to presume two fields of commerce, one subject to national and the other to state control. The distinction between these two fields appears to be gradually becoming less clear, as the commercial activities of the country become more important in scope and more complex in character. The closer interrelationship of the two fields of commerce has meant also a considerable increase in national power at the expense of the states. This development is shown most strikingly in the changing attitude of the courts towards the matter of railroad regulation. In the Minnesota Rate Cases (230 U. S. 352), decided in 1913, the Supreme Court upheld the power of the states to fix local rates (at least in the absence of congressional legislation), even though such rates affected also interstate commerce. In the so-called Shreveport Case (234 U. S. 342), decided a year

later, the Court held that Congress, acting through the Interstate Commerce Commission, could regulate the relationship between intrastate and interstate rates in such a way as to prevent discrimination against interstate commerce. Finally, in 1922, the Court upheld the power of the Interstate Commerce Commission actually to fix intrastate rates where in its opinion necessary to secure the effectiveness of the interstate rate. In this case, the Court emphasized more than ever before the unity and interrelationship of commerce, and the paramount importance of the national over state interests.

[*Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Co.* (1922), 257 U. S. 563, 588; 66 L. Ed. 371, 383.]

Mr. Chief Justice Taft . . . delivered the opinion of the court: . . .

It is objected here, as it was in the Shreveport Case, that orders of the Commission which raise the intrastate rates to a level of the interstate structure violate the specific proviso of the original Interstate Commerce Act, repeated in the amending acts, that the Commission is not to regulate traffic wholly within a state. To this, the same answer must be made as was made in the Shreveport Case (234 U. S. 342, 358, 58 L. ed. 1341, 1351, 34 Sup. Ct. Rep. 833), that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce, and necessary to its efficiency. Effective control of the one must embrace some control over the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the Constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, cannot exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority or a violation of the proviso.

## 99. RELATION BETWEEN COMMERCE POWER AND POLICE POWER

As was pointed out with respect to the power of taxation, so Congress has, in the exercise of its commerce power, enacted numerous measures that are in effect police regulations, and the courts have for the most part upheld these laws as appropriate regulations of commerce. Congress has in this manner suppressed lotteries, prevented the adulteration of foods and drugs, penalized the practice of white slavery, compelled the use of safety appliance on railroads, provided shorter hours and better working conditions for certain classes of labor, and so on. Finally, in response to the demand for the suppression of the evil of child labor, Congress in 1916 enacted a law prohibiting the shipment in interstate commerce of the products of mines or factories in which children under the ages of fourteen to sixteen were

permitted to work. This act the Supreme Court, with four Justices dissenting, declared unconstitutional in 1918, certain limits thus being imposed on the power of Congress to enter the field of the states.

The converse of this problem has also caused difficulty, the police power of the states frequently being exercised in such manner as to affect interstate commerce. To meet this situation the courts devised the doctrine that, if such police regulations of any state amounted also to a direct regulation of interstate commerce, they could not be permitted; but if an indirect interference, they would be upheld. An important application of this doctrine was made by the Supreme Court in 1927, when it invalidated a Pennsylvania statute regulating the sale of steamship tickets by agencies, clearly an attempt to prevent fraud in such sales. The decision is notable for the sharp difference of opinion in the Court, and for the attempt on the part of the dissenting Justices to secure the abandonment of the doctrine of direct and indirect burdens on commerce.

#### a. First Child Labor Case

[*Hammer v. Dagenhart* (1918), 247 U. S. 251, 271-274, 278-281; 62 L. Ed. 1101, 1105-1106, 1108-1110.]

Mr. Justice Day delivered the opinion of the court:

. . . The thing intended to be accomplished by this statute is the denial of the facilities of interstate commerce to those manufacturers in the states who employ children within the prohibited ages. The act in its effect does not regulate transportation among the states, but aims to standardize the ages at which children may be employed in mining and manufacturing within the states. The goods shipped are of themselves harmless. The act permits them to be freely shipped after thirty days from the time of their removal from the factory. When offered for shipment, and before transportation begins, the labor of their production is over, and the mere fact that they were intended for interstate commerce transportation does not make their production subject to Federal control under the commerce power. . . . The making of goods and the mining of coal are not commerce, nor does the fact that these things are to be afterwards shipped, or used in interstate commerce, make their production a part thereof. . . .

Over interstate transportation, or its incidents, the regulatory power of Congress is ample, but the production of articles intended for interstate commerce is a matter of local regulation. . . . If it were otherwise, all manufacture intended for interstate shipment would be brought under Federal control to the practical exclusion of the authority of the states,—a result certainly not contemplated by the framers of the Constitution when they vested in Congress the authority to regulate commerce among the states. . . .

It is further contended that the authority of Congress may be exerted to control interstate commerce in the shipment of child-made goods because of the effect of the circulation of such goods in other states where the evil of this class of labor has been recognized by local legislation, and the right to thus employ child labor has been more rigorously restrained than in the state of production. In other words, that the unfair competition thus engendered may be controlled by closing the channels of interstate commerce to manufacturers in those states where the local laws do not meet what Congress deems to be the more just standard of other states.

There is no power vested in Congress to require the states to exercise their police power so as to prevent possible unfair competition. Many causes may co-operate to give one state, by reason of local laws or conditions, an economic advantage over others. The commerce clause was not intended to give to Congress a general authority to equalize such conditions. In some of the states laws have been passed fixing minimum wages for women; in others the local law regulates the hours of labor of women in various employments. Business done in such states may be at an economic disadvantage when compared with states which have no such regulations; surely, this fact does not give Congress the power to deny transportation in interstate commerce to those who carry on business where the hours of labor and the rate of compensation for women have not been fixed by a standard in use in other states and approved by Congress.

The grant of power to Congress over the subject of interstate commerce was to enable it to regulate such commerce, and not to give it authority to control the states in their exercise of the police power over local trade and manufacture.

The grant of authority over a purely Federal matter was not intended to destroy the local power always existing and carefully reserved to the states in the 10th Amendment to the Constitution.

Police regulations relating to the internal trade and affairs of the states have been uniformly recognized as within such control. "This," said this court in *United States v. Dewitt*, 9 Wall. 41, 45, 19 L. ed. 593, 594, "has been so frequently declared by this court, results so obviously from the terms of the Constitution, and has been so fully explained and supported on former occasions, that we think it unnecessary to enter again upon the discussion." . . .

Mr. Justice Holmes, dissenting: . . .

The question, then, is narrowed to whether the exercise of its otherwise constitutional power by Congress can be pronounced unconstitu-



tional because of its possible reaction upon the conduct of the states in a matter upon which I have admitted that they are free from direct control. I should have thought that that matter had been disposed of so fully as to leave no room for doubt. I should have thought that the most conspicuous decisions of this court had made it clear that the power to regulate commerce and other constitutional powers could not be cut down or qualified by the fact that it might interfere with the carrying out of the domestic policy of any state.

The manufacture of oleomargarine is as much a matter of state regulation as the manufacture of cotton cloth. Congress levied a tax upon the compound when colored so as to resemble butter that was so great as obviously to prohibit the manufacture and sale. In a very elaborate discussion the present Chief Justice excluded any inquiry into the purpose of an act which, apart from that purpose, was within the power of Congress. *McCray v. United States*, 195 U. S. 27, 49 L. ed. 78. . . . Fifty years ago a tax on state banks, the obvious purpose and actual effect of which was to drive them, or at least their circulation, out of existence, was sustained, although the result was one that Congress had no constitutional power to require. . . .

The Pure Food and Drug Act was sustained in *Hipolite Egg Co. v. United States*, 220 U. S. 45, 55 L. ed. 364, 31 Sup. Ct. Rep. 364, with the intimation that "no trade can be carried on between the states to which it [the power of Congress to regulate commerce] does not extend," 57, applies not merely to articles that the changing opinions of time condemn as intrinsically harmful, but to others innocent in themselves, simply on the ground that the order for them was induced by a preliminary fraud. *Weeks v. United States*, 245 U. S. 618, ante, 513, 38 Sup. Ct. Rep. 219. It does not matter whether the supposed evil precedes or follows the transportation. It is enough that, in the opinion of Congress, the transportation encourages the evil. I may add that in the cases on the so-called White Slave Act it was established that the means adopted by Congress as convenient to the exercise of its power might have the character of police regulations. . . .

The notion that prohibition is any less prohibition when applied to things now thought evil I do not understand. But if there is any matter upon which civilized countries have agreed,—far more unanimously than they have with regard to intoxicants and some other matters over which this country is now emotionally aroused,—it is the evil of premature and excessive child labor. I should have thought that if we were to introduce our own moral conceptions where, in my opinion, they do not be-



long, this was pre-eminently a case for upholding the exercise of all its powers by the United States.

But I had thought that the propriety of the exercise of a power admitted to exist in some cases was for the consideration of Congress alone, and that this court always had disavowed the right to intrude its judgment upon questions of policy or morals. It is not for this court to pronounce when prohibition is necessary to regulation if it ever may be necessary,—to say that it is permissible as against strong drink, but not as against the product of ruined lives.

The act does not meddle with anything belonging to the states. They may regulate their internal affairs and their domestic commerce as they like. But when they seek to send their products across the state line they are no longer within their rights. If there were no Constitution and no Congress their power to cross the line would depend upon their neighbors. Under the Constitution such commerce belongs not to the states, but to Congress to regulate. It may carry out its views of public policy whatever indirect effect they may have upon the activities of the states. Instead of being encountered by a prohibitive tariff at her boundaries, the state encounters the public policy of the United States which it is for Congress to express. The public policy of the United States is shaped with a view to the benefit of the nation as a whole. If, as has been the case within the memory of men still living, a state should take a different view of the propriety of sustaining a lottery from that which generally prevails, I cannot believe that the fact would require a different decision from that reached in *Champion v. Ames*. Yet in that case it would be said with quite as much force as in this that Congress was attempting to intermeddle with the state's domestic affairs. The national welfare as understood by Congress may require a different attitude within its sphere from that of some self-seeking state. It seems to me entirely constitutional for Congress to enforce its understanding by all the means at its command.

[Justices McKenna, Brandeis, and Clarke concurred in this dissenting opinion.]

#### **b. Doctrine of Direct and Indirect Interference**

[*Giovanni di Santo v. Pennsylvania* (1927), 273 U. S. 34-45; 71 L. Ed. 524-530.]

Mr. Justice Butler delivered the opinion of the court: . . .

The soliciting of passengers and the sale of steamship tickets and orders for passage between the United States and Europe constitute a

well-recognized part of foreign commerce. . . . A state statute which by its necessary operation directly interferes with or burdens foreign commerce is a prohibited regulation and invalid, regardless of the purpose with which it was passed. . . . Such legislation cannot be sustained as an exertion of the police power of the State to prevent possible fraud. . . . The Congress has complete and paramount authority to regulate foreign commerce and, by appropriate measures, to protect the public against the frauds of those who sell these tickets and orders. The sales here in question are related to foreign commerce as directly as are sales made in ticket offices maintained by the carriers and operated by their servants and employees. The license fee and other things imposed by the Act on plaintiff in error, who initiates for his principals a transaction in foreign commerce, constitute a direct burden on that commerce. . . .

Mr. Justice Stone, dissenting:

. . . We are not here concerned with a question of taxation to which other considerations may apply, but with state regulation of what may be conceded to be an instrumentality of foreign commerce. As this Court has many times decided, the purpose of the commerce clause was not to preclude all state regulation of commerce crossing state lines, but to prevent discrimination and the erection of barriers or obstacles to the free flow of commerce, interstate or foreign.

The recognition of the power of the states to regulate commerce within certain limits is a recognition that there are matters of local concern which may properly be subject to state regulation and which, because of their local character, as well as their number and diversity, can never be adequately dealt with by Congress. Such regulation, so long as it does not impede the free flow of commerce, may properly be and for the most part has been left to the states by the decisions of this Court.

In this case the traditional test of the limit of state action by inquiring whether the interference with commerce is direct or indirect seems to me too mechanical, too uncertain in its application, and too remote from actualities, to be of value. In thus making use of the expressions, "direct" and "indirect interference" with commerce, we are doing little more than using labels to describe a result rather than any trustworthy formula by which it is reached.

It is difficult to say that such permitted interferences as those enumerated in Mr. Justice Brandeis' opinion are less direct than the interference prohibited here. But it seems clear that those interferences not deemed forbidden are to be sustained, not because the effect on com-

merce is nominally indirect, but because a consideration of all the facts and circumstances, such as the nature of the regulation, its function, the character of the business involved and the actual effect on the flow of commerce, lead to the conclusion that the regulation concerns interests peculiarly local and does not infringe the national interest in maintaining the freedom of commerce across state lines.

I am not persuaded that the regulation here is more than local in character or that it interposes any barrier to commerce. Until Congress undertakes the protection of local communities from the dishonesty of the sellers of steamship tickets, it would seem that there is no adequate ground for holding that the regulation here involved is a prohibited interference with commerce.

Mr. Justice Holmes and Mr. Justice Brandeis concur in this opinion.

## CHAPTER XVII

### FOREIGN AFFAIRS

#### 100. POLICY OF NON-ENTANGLEMENT IN EUROPE

The only formal alliance into which the United States has entered was that with France in 1778. Our unfortunate experience in that connection was doubtless what President Washington had largely in mind when he touched upon our foreign relations in his farewell address of 1796 to his fellow-citizens. His statement, whether or not apropos of later conditions, has had considerable influence upon the course of our foreign policy.

[Washington's Farewell Address, in Richardson, *Messages and Papers of the Presidents*, vol. I, pp. 222-223.]

. . . The great rule of conduct for us in regard to foreign nations is, in extending our commercial relations to have with them as little political connection as possible. So far as we have already formed engagements let them be fulfilled with perfect good faith. Here let us stop.

Europe has a set of primary interests which to us have none or a very remote relation. Hence she must be engaged in frequent controversies, the causes of which are essentially foreign to our concerns. Hence, therefore, it must be unwise in us to implicate ourselves by artificial ties in the ordinary vicissitudes of her politics or the ordinary combinations and collisions of her friendships or enmities.

Our detached and distant situation invites and enables us to pursue a different course. If we remain one people, under an efficient government, the period is not far off when we may defy material injury from external annoyance; when we may take such an attitude as will cause the neutrality we may at any time resolve upon to be scrupulously respected; when belligerent nations, under the impossibility of making acquisitions upon us, will not lightly hazard the giving us provocation; when we may choose peace or war, as our interest, guided by justice, shall counsel.

Why forego the advantages of so peculiar a situation? Why quit our own to stand upon foreign ground? Why, by interweaving our destiny with that of any part of Europe, entangle our peace and prosperity in the toils of European ambition, rivalry, interest, humor, or caprice?

It is our true policy to steer clear of permanent alliances with any portion of the foreign world, so far, I mean, as we are now at liberty

to do it; for let me not be understood as capable of patronizing infidelity to existing engagements. I hold the maxim no less applicable to public than to private affairs that honesty is always the best policy. I repeat, therefore, let those engagements be observed in their genuine sense. But in my opinion it is unnecessary and would be unwise to extend them.

Taking care always to keep ourselves by suitable establishments on a respectable defensive posture, we may safely trust to temporary alliances for extraordinary emergencies. . . .

### 101. THE MONROE DOCTRINE

As a corollary to our policy of aloofness from European affairs, it seemed appropriate that European nations should be warned against interfering in the affairs of the Western Hemisphere. An opportunity for issuing such a warning presented itself after the recognition by the United States in 1822 of the independence of the former Spanish-American colonies which had revolted and set up governments that were republican in form. Several nations of Europe, calling themselves the Holy Alliance, seemed bent on restoring these new American republics to Spain. In this emergency President Monroe sent to Congress in December, 1823, a message containing the famous doctrine which bears his name. The Monroe Doctrine so enunciated has continued to be the cardinal principle of our foreign policy for more than a century, but in its application it has received various interpretations and extensions. Thus President Roosevelt, in 1904, felt compelled to intervene in Santo Domingo for the purpose of maintaining order and avoiding any excuse for European intervention. In so doing, he justified himself by an interpretation of the Monroe Doctrine since known as the Roosevelt Corollary. Again, in 1912, when there were reports of a Japanese colonization scheme on Magdalena Bay in Lower California, Mexico, Senator Lodge secured the passage of a simple Senate resolution, which made a further extension of the Monroe Doctrine and is therefore commonly called the Lodge Amendment. Finally, President Wilson, in attempting to bring the warring nations together for a definition of peace terms in December, 1916, assumed that the United States would join in some concert of power for the preservation of peace, and, in a notable address to the Senate on January 22, 1917, expressed his belief that such participation in world affairs would not be a violation of the Monroe Doctrine but an expansion of it to meet new conditions. In more recent years, the United States has shown a desire to modify the Doctrine so as to make it more palatable to our Latin-American neighbors, evidence of this desire being found especially in the Clark Memorandum prepared in 1928 for the State Department by Undersecretary of State J. Reuben Clark. President Franklin D. Roosevelt, in his first inaugural address, carried on the new policy of conciliation of Latin America by his emphasis on the policy as that of the "good neighbor," and later in 1933 he further declared that any necessary intervention in Latin America for the maintenance of constitutional government would not be an obligation of the United States alone, but would be the joint concern of the whole continent. This "continentalization" of the Monroe Doctrine was confirmed by a convention adopted by the Inter-American Conference for the Maintenance of Peace, held at Buenos Aires in 1936.

## a. Original Monroe Doctrine

[Richardson, *Messages and Papers of the Presidents*, vol. II, pp. 217-219.]

It was stated at the commencement of the last session that a great effort was then making in Spain and Portugal to improve the condition of the people of those countries, and that it appeared to be conducted with extraordinary moderation. It need scarcely be remarked that the result has been, so far, very different from what was then anticipated. Of events in that quarter of the globe with which we have so much intercourse, and from which we derive our origin, we have always been anxious and interested spectators. The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow-men on that side of the Atlantic. In the wars of the European powers in matters relating to themselves we have never taken any part, nor does it comport with our policy so to do. It is only when our rights are invaded or seriously menaced that we resent injuries or make preparation for our defense. With the movements in this hemisphere we are, of necessity, more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective Governments. And to the defense of our own, which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of their most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered and shall not interfere. But with the governments who have declared their independence and maintained it, and whose independence we have, on great consideration and on just principles, acknowledged, we could not view any interposition for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States. In the war between these new governments and Spain we declared our neutrality at the time of their recognition, and to this we have adhered and shall continue to adhere, provided no change shall occur which, in the judgment of the



competent authorities of this Government, shall make a corresponding change on the part of the United States indispensable to their security.

The late events in Spain and Portugal show that Europe is still unsettled. Of this important fact no stronger proof can be adduced than that the allied powers should have thought it proper, on any principle satisfactory to themselves, to have interposed, by force, in the internal concerns of Spain. To what extent such interposition may be carried, on the same principle, is a question in which all independent powers whose governments differ from theirs are interested, even those most remote, and surely none more so than the United States. Our policy in regard to Europe, which was adopted at an early stage of the wars which have so long agitated that quarter of the globe, nevertheless remains the same, which is, not to interfere in the internal concerns of any of its powers; to consider the government *de facto* as the legitimate government for us; to cultivate friendly relations with it, and to preserve those relations by a frank, firm, and manly policy, meeting, in all instances, the just claims of every power, submitting to injuries from none. But in regard to these continents, circumstances are eminently and conspicuously different. It is impossible that the allied powers should extend their political system to any portion of either continent without endangering our peace and happiness; nor can anyone believe that our southern brethren, if left to themselves, would adopt it of their own accord. It is equally impossible, therefore, that we should behold such interposition, in any form, with indifference. If we look to the comparative strength and resources of Spain and those new governments, and their distance from each other, it must be obvious that she can never subdue them. It is still the true policy of the United States to leave the parties to themselves, in the hope that other powers will pursue the same course.

#### **b. Roosevelt Corollary**

[Message to Congress, December, 1904, in *Foreign Relations of the United States, 1904*, p. XLI.]

If a nation shows that it knows how to act with reasonable efficiency and decency in social and political matters; if it keeps order and pays its obligations, it need fear no interference from the United States. Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may in America, as elsewhere, ultimately require intervention by some civilized nation, and in the Western Hemisphere the adherence of the United States to the Monroe Doctrine may force the

United States, however reluctantly, in flagrant cases of such wrongdoing or impotence, to the exercise of an international police power.

### c. Magdalena Bay Resolution

[Senate Resolution, adopted Aug. 2, 1912. *Congressional Record*, vol. 48, pp. 10045-10047.]

*Resolved*, That when any harbor or other place in the American continents is so situated that the occupation thereof for military or naval purposes might threaten the communications or the safety of the United States, the Government of the United States could not see without grave concern the possession of such harbor or other place by any corporation or association which has such a relation to another Government, not American, as to give that Government practical power of control for naval or military purposes.

### d. Wilson Interpretation

[Address to Senate, Jan. 22, 1917. *Congressional Record*, vol. 54, p. 1741.]

. . . . .  
And in holding out the expectation that the people and Government of the United States will join the other civilized nations of the world in guaranteeing the permanence of peace upon such terms as I have named, I speak with the greater boldness and confidence because it is clear to every man who can think that there is in this promise no breach in either our traditions or our policy as a nation, but a fulfilment, rather, of all that we have professed or striven for.

I am proposing, as it were, that the nations should with one accord adopt the doctrine of President Monroe as the doctrine of the world: that no nation should seek to extend its polity over any other nation or people, but that every people should be left free to determine its own polity, its own way of development, unhindered, unthreatened, unafraid, the little along with the great and powerful.

I am proposing that all nations henceforth avoid entangling alliances which would draw them into competitions of power, catch them in a net of intrigue and selfish rivalry, and disturb their own affairs with influences intruded from without. There is no entangling alliance in a concert of power. When all unite to act in the same sense and with the same purpose all act in the common interest and are free to live their own lives under a common protection.

### e. Clark Memorandum

[J. Reuben Clark, *Memorandum on the Monroe Doctrine* (State Department Publication, 1930), p. XIX.]

. . . It is of the first importance to have in mind that Monroe's declaration in its terms, relates solely to the relationships between European states on the one side, and, on the other side, the American continents, the Western Hemisphere, and the Latin American Governments which on December 2, 1823, had declared and maintained their independence which we had acknowledged.

It is of equal importance to note, on the other hand, that the declaration does not apply to purely inter-American relations.

Nor does the declaration purport to lay down any principles that are to govern the interrelationship of the states of this Western Hemisphere as among themselves.

The Doctrine states a case of United States *vs.* Europe, not of United States *vs.* Latin America. . . .

### f. The Good Neighbor Policy

[First Inaugural Address of President Franklin D. Roosevelt, Mar. 4, 1933.]

In the field of world policy I would dedicate this nation to the policy of the good neighbor—the neighbor who resolutely respects himself and, because he does so, respects the rights of others—the neighbor who respects his obligations and respects the sanctity of his agreements in and with a world of neighbors.

### g. Doctrine of Continentalization

[Statement of President Franklin D. Roosevelt, in *State Department Press Releases*, Dec. 30, 1933, pp. 380–381.]

. . . In a speech in Mobile, President Wilson first enunciated the definite statement “that the United States will never again seek one additional foot of territory by conquest.” The United States accepted that declaration of policy. President Wilson went further, pointing out with special reference to our Latin American neighbors that material interests must never be made superior to human liberty. . . .

. . . the time has come to supplement and to implement the declaration of President Wilson by the further declaration that the definite

policy of the United States from now on is one opposed to armed intervention.

The maintenance of constitutional government in other nations is not a sacred obligation devolving upon the United States alone. The maintenance of law and the orderly processes of government in this hemisphere is the concern of each individual nation within its own borders first of all. It is only if and when the failure of orderly processes affects the other nations of the continent that it becomes their concern; and the point to stress is that in such an event it becomes the joint concern of a whole continent in which we are all neighbors.

#### **h. Buenos Aires Convention**

[*State Department Press Releases*, Dec. 26, 1936, pp. 537-538.]

ART. II. The High Contracting Parties, convinced of the necessity for . . . cooperation and consultation, agree that in all matters which affect peace on the Continent, such consultation and cooperation shall have as their object to assist, through the tender of friendly good offices and of mediation, the fulfillment by the American Republics of existing obligations for a pacific settlement, and to take counsel together, with full recognition of their juridical equality, as sovereign and independent States, and of their general right to individual liberty of action, when an emergency arises which affects their common interest in the maintenance of peace.

### **102. EXECUTIVE AGREEMENTS**

In the conduct of our foreign relations, it not infrequently becomes necessary for the President, or agents acting on his behalf, to make agreements with other nations without the formality of submitting them to the Senate for its advice and consent. Such executive agreements sometimes prove to be permanent arrangements, but usually they are intended to serve merely until a definitive treaty covering the same matters can be made. These temporary or provisional agreements are sometimes called protocols or *modi vivendi*. Thus, on August 12, 1898, the American Secretary of State and the French Ambassador at Washington, the latter acting on behalf of the government of Spain, signed a protocol of agreement as to the basis of peace between the two governments. Its provisions were subsequently incorporated in the definitive treaty of peace. Similarly, an agreement, entered into November 2, 1917, by an exchange of notes between Secretary of State Lansing for the United States and Ambassador Ishii for Japan, undertook to define our attitude towards current questions in the Far East and recognized the special interest of Japan in that region on account of her territorial propinquity. After the Wash-

ington Conference of 1921-22 and the treaties entered into thereat, which covered the subject matter of the Lansing-Ishii agreement, the latter was deemed no longer to serve a useful purpose. Consequently, on April 14, 1923, the cancellation of the agreement was effected through the exchange of identic notes between Secretary of State Hughes and Ambassador Hanihara.

#### a. Protocol with Spain, 1898

[Malloy, *Treaties, Conventions . . . between the United States and Other Powers*, vol. II, pp. 1688-1689.]

William R. Day, Secretary of State of the United States, and His Excellency Jules Cambon, Ambassador Extraordinary and Plenipotentiary of the Republic of France at Washington, respectively possessing for this purpose full authority from the Government of the United States and the Government of Spain, have concluded and signed the following articles, embodying the terms on which the two Governments have agreed in respect to the matters hereinafter set forth, having in view the establishment of peace between the two countries, that is to say:

##### ARTICLE I

Spain will relinquish all claim of sovereignty over and title to Cuba.

##### ARTICLE II

Spain will cede to the United States the island of Porto Rico and other islands now under Spanish sovereignty in the West Indies, and also an island in the Ladrones to be selected by the United States.

##### ARTICLE III

The United States will occupy and hold the city, bay and harbor of Manila, pending the conclusion of a treaty of peace which shall determine the control, disposition and government of the Philippines.

##### ARTICLE IV

Spain will immediately evacuate Cuba, Porto Rico and other islands now under Spanish sovereignty in the West Indies; and to this end each Government will, within ten days after the signing of this protocol, appoint Commissioners, and the Commissioners so appointed shall, within thirty days after the signing of this protocol, meet at Havana for the purpose of arranging and carrying out the details of the aforesaid evacuation of Cuba and the adjacent Spanish islands; and each Government

will, within ten days after the signing of this protocol, also appoint other Commissioners, who shall, within thirty days after the signing of this protocol, meet at San Juan, in Porto Rico, for the purpose of arranging and carrying out the details of the aforesaid evacuation of Porto Rico and other islands now under Spanish sovereignty in the West Indies.

#### ARTICLE V

The United States and Spain will each appoint not more than five commissioners to treat of peace, and the commissioners so appointed shall meet at Paris not later than October 1, 1898, and proceed to the negotiation and conclusion of a treaty of peace, which treaty shall be subject to ratification according to the respective constitutional forms of the two countries.

#### ARTICLE VI

Upon the conclusion and signing of this protocol, hostilities between the two countries shall be suspended, and notice to that effect shall be given as soon as possible by each Government to the commanders of its military and naval forces.

Done at Washington in duplicate, in English and in French, by the Undersigned, who have hereunto set their hands and seals, the 12th day of August 1898.

(SEAL)

WILLIAM R. DAY.

(SEAL)

JULES CAMBON.

#### b. Cancellation of Lansing-Ishii Agreement

[*American Journal of International Law*, vol. 17, p. 510 (July, 1923).]

Secretary Hughes thus wrote to Mr. Hanihara:

I have the honor to communicate to your Excellency my understanding of the views developed by the discussions which I have recently had with your Embassy in reference to the status of the Lansing-Ishii exchange of notes of November 2, 1917.

The discussions between the two Governments have disclosed an identity of view and, in the light of the understandings arrived at by the Washington Conference on the Limitation of Armament, the American and Japanese Governments are agreed to consider the Lansing-Ishii correspondence of November 2, 1917, as cancelled and of no further force or effect.



On the same date Ambassador Hanihara wrote to Secretary Hughes:

I have the honor to acknowledge the receipt of your note of today's date, communicating to me your understanding of the views developed by the discussions which you have recently had with this Embassy in reference to the status of the Ishii-Lansing exchange of notes of November 2, 1917.

I am happy to be able to confirm to you, under instructions from my Government, your understanding of the views thus developed, as set forth in the following terms:

The discussions between the two Governments have disclosed an identity of view and, in the light of the understandings arrived at by the Washington Conference on the Limitation of Armament, the Japanese and American Governments are agreed to consider the Ishii-Lansing correspondence of November 2, 1917, as cancelled and of no further force or effect.

### 103. POLICY OF NEUTRALITY

Upon the outbreak of war between France and Great Britain in 1793, President Washington issued a proclamation declaring the neutrality of the United States. That proclamation is a landmark in the history both of international law and of the governmental practice and policy of the United States toward other powers at war, and set a precedent regularly followed by later Presidents. The neutrality policy thus largely determined by presidential proclamation was based upon the commonly accepted principles of international law, the immediate application and enforcement of which, so far as American rights and duties were concerned, being almost entirely within the discretion of the President. The disappointment with the League of Nations, Kellogg-Briand Pact for the Outlawry of War, World Disarmament Conference, and other attempts to preserve peace following the World War of 1914-1918; the disclosures of the Senate Munitions Committee, known as the Nye Committee, which left a widespread impression that the sale of arms and munitions by American firms to the Allies during the World War was one of the principal causes of American entrance into that conflict; the Italian attack upon Ethiopia in 1935—these and other developments persuaded many Americans that the United States should, through national legislation, adopt a carefully constructed plan to prevent us from being drawn into future wars. Accordingly Congress in 1935 enacted so-called neutrality legislation designed for this purpose, the principal feature of which was the provision for an embargo on the export of "arms, ammunition, or implements of war" to any foreign countries (excepting, under certain conditions, American republics) found by the President to be in a state of war. This represented the abandonment of a right upon which we had particularly insisted during the World War of 1914-1918, and was repealed by the Neutrality Act of 1939. That later Act retained, however, the "cash and carry" provisions, and applied them to arms, so that, with certain exceptions, arms and other materials could not be exported to countries at war unless paid for in cash and transported in foreign ships. The two-fold purpose of these and other pro-

visions in the Neutrality Act was, first, to minimize the risk of American involvement in war through the capture of American-owned vessels and goods on the high seas, and, secondly, to permit aid to England and France, as democratic powers engaged in fighting Nazi Germany and at the same time having both the cash and the ships in which to transport the goods from our shores. The difficulty of regulating such matters by general legislation, however, is shown by the fact that the "cash-and-carry" provisions also operated in the Far Eastern conflict to aid Japan rather than China. Other difficulties in the administration of the law may well lead to future amendments or modifications.

### a. Washington's Proclamation of 1793

[*American State Papers, Foreign Relations*, vol. I, p. 140. Facsimile in Moore, *Principles of American Diplomacy*, p. 41.]

By the President of the United States of America.

#### A PROCLAMATION

WHEREAS it appears that a state of war exists between Austria, Prussia, Sardinia, Great-Britain, and the United Netherlands, of the one part, and France on the other, and the duty and interest of the United States require, that they should with sincerity and good faith adopt and pursue a conduct friendly and impartial toward the belligerent powers:

I have therefore thought fit by these presents to declare the disposition of the United States to observe the conduct aforesaid towards those powers respectively; and to exhort and warn the citizens of the United States carefully to avoid all acts and proceedings whatsoever, which may in any manner tend to contravene such disposition.

And I do hereby also make known that whosoever of the citizens of the United States shall render himself liable to punishment or forfeiture under the law of nations, by committing, aiding or abetting hostilities against any of the said powers, or by carrying to any of them those articles, which are deemed contraband by the modern usage of nations, will not receive the protection of the United States, against such punishment or forfeiture: and further, that I have given instructions to those officers, to whom it belongs, to cause prosecutions to be instituted against all persons, who shall, within the cognizance of the courts of the United States, violate the Law of Nations, with respect to the powers at war, or any of them.

IN TESTIMONY WHEREOF I have caused the Seal of the United States of America to be affixed to these presents, and signed the same with my hand. Done at the city of Philadelphia, the twenty-second day

of April, one thousand seven hundred and ninety-three, and of the Independence of the United States of America the seventeenth.

GO. WASHINGTON.

By the President.

TH : JEFFERSON

### b. Wilson's Proclamation of 1914

[*U. S. Statutes at Large*, vol. 38, pp. 1999-2002.]

By the President of the United States of America.

#### A PROCLAMATION

Whereas a state of war unhappily exists between Austria-Hungary and Servia and between Germany and Russia and between Germany and France; And Whereas the United States is on terms of friendship and amity with the contending powers, and with the persons inhabiting their several dominions:

And Whereas there are citizens of the United States residing within the territories or dominions of each of the said belligerents and carrying on commerce, trade, or other business or pursuits therein;

And Whereas there are subjects of each of the said belligerents residing within the territory or jurisdiction of the United States, and carrying on commerce, trade, or other business or pursuits therein;

And Whereas the laws and treaties of the United States, without interfering with the free expression of opinion and sympathy, or with the commercial manufacture or sale of arms or munitions of war, nevertheless impose upon all persons who may be within their territory and jurisdiction the duty of an impartial neutrality during the existence of the contest;

And Whereas it is the duty of a neutral government not to permit or suffer the making of its waters subservient to the purposes of war;

Now, Therefore, I, Woodrow Wilson, President of the United States of America, in order to preserve the neutrality of the United States and of its citizens and of persons within its territory and jurisdiction, and to enforce its laws and treaties, and in order that all persons, being warned of the general tenor of the laws and treaties of the United States in this behalf, and of the law of nations, may thus be prevented from any violation of the same, do hereby declare and proclaim that by certain provisions of the act approved on the 4th day of March, A. D. 1909, commonly known as the "Penal Code of the United States" the

following acts are forbidden to be done, under severe penalties, within the territory and jurisdiction of the United States, to wit:—

1. Accepting and exercising a commission to serve either of the said belligerents by land or by sea against the other belligerent.

2. Enlisting or entering into the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

3. Hiring or retaining another person to enlist or enter himself in the service of either of the said belligerents as a soldier, or as a marine, or seaman on board of any vessel of war, letter of marque, or privateer.

4. Hiring another person to go beyond the limits or jurisdiction of the United States with intent to be enlisted as aforesaid.

5. Hiring another person to go beyond the limits of the United States with intent to be entered into service as aforesaid.

6. Retaining another person to go beyond the limits of the United States with intent to be enlisted as aforesaid.

7. Retaining another person to go beyond the limits of the United States with intent to be entered into service as aforesaid. (But the said act is not to be construed to extend to a citizen or subject of either belligerent who, being transiently within the United States, shall, on board of any vessel of war, which, at the time of its arrival within the United States, was fitted and equipped as such vessel of war, enlist or enter himself or hire or retain another subject or citizen of the same belligerent, who is transiently within the United States, to enlist or enter himself to serve such belligerent on board such vessel of war, if the United States shall then be at peace with such belligerent.)

8. Fitting out and arming, or attempting to fit out and arm, or procuring to be fitted out and armed, or knowingly being concerned in the furnishing, fitting out, or arming of any ship or vessel with intent that such ship or vessel shall be employed in the service of either of the said belligerents.

9. Issuing or delivering a commission within the territory or jurisdiction of the United States for any ship or vessel to the intent that she may be employed as aforesaid.

10. Increasing or augmenting, or procuring to be increased or augmented, or knowingly being concerned in increasing or augmenting, the force of any ship of war, cruiser, or other armed vessel, which at the time of her arrival within the United States was a ship of war, cruiser, or armed vessel in the service of either of the said belligerents, or belonging to the subjects of either, by adding to the number of guns of

such vessels, or by changing those on board of her for guns of a larger calibre, or by the addition thereto of any equipment solely applicable to war.

11. Beginning or setting on foot or providing or preparing the means for any military expedition or enterprise to be carried on from the territory or jurisdiction of the United States against the territories or dominions of either of the said belligerents.

. . . . .  
And I do further declare and proclaim that the statutes and the treaties of the United States and the law of nations alike require that no person, within the territory and jurisdiction of the United States, shall take part, directly or indirectly, in the said wars, but shall remain at peace with all of the said belligerents, and shall maintain a strict and impartial neutrality.

And I do hereby enjoin all citizens of the United States, and all persons residing or being within the territory or jurisdiction of the United States, to observe the laws thereof, and to commit no act contrary to the provisions of the said statutes or treaties or in violation of the law of nations in that behalf.

And I do hereby warn all citizens of the United States, and all persons residing or being within its territory or jurisdiction that, while the free and full expression of sympathies in public and private is not restricted by the laws of the United States, military forces in aid of a belligerent can not lawfully be originated or organized within its jurisdiction; and that, while all persons may lawfully and without restriction by reason of the aforesaid state of war manufacture and sell within the United States arms and munitions of war, and other articles ordinarily known as "contraband of war," yet they cannot carry such articles upon the high seas for the use or service of a belligerent, nor can they transport soldiers and officers of a belligerent, or attempt to break any blockade which may be lawfully established and maintained during the said wars without incurring the risk of hostile capture and the penalties denounced by the law of nations in that behalf.

And I do hereby give notice that all citizens of the United States and others who may claim the protection of this government, who may misconduct themselves in the premises, will do so at their peril, and that they can in no wise obtain any protection from the government of the United States against the consequences of their misconduct.

In Witness Whereof I have hereunto set my hand and caused the seal of the United States to be affixed.

Done at the city of Washington this fourth day of August in the year of our Lord one thousand nine hundred and four-  
(SEAL) teen and of the independence of the United States of America the one hundred and thirty-ninth.

WOODROW WILSON.

By the President:

WILLIAM JENNINGS BRYAN  
Secretary of State.

### c. Neutrality Act of 1939

[Public Resolution No. 54, 76th Congress, 2nd Session.]

#### JOINT RESOLUTION

To preserve the neutrality and the peace of the United States and to secure the safety of its citizens and their interests.

Whereas the United States, desiring to preserve its neutrality in wars between foreign states and desiring also to avoid involvement therein, voluntarily imposes upon its nationals by domestic legislation the restrictions set out in this joint resolution; and

Whereas by so doing the United States waives none of its own rights or privileges, or those of any of its nationals, under international law, and expressly reserves all the rights and privileges to which it and its nationals are entitled under the law of nations; and

Whereas the United States hereby expressly reserves the right to repeal, change or modify this joint resolution or any other domestic legislation in the interests of the peace, security or welfare of the United States and its people: Therefore be it

*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,*

#### PROCLAMATION OF A STATE OF WAR BETWEEN FOREIGN STATES

SECTION 1. (a) That whenever the President, or the Congress by concurrent resolution, shall find that there exists a state of war between foreign states, and that it is necessary to promote the security or preserve the peace of the United States or to protect the lives of citizens of the United States, the President shall issue a proclamation naming the states involved; and he shall, from time to time, by proclamation, name other states as and when they may become involved in the war.



(b) Whenever the state of war which shall have caused the President to issue any proclamation under the authority of this section shall have ceased to exist with respect to any state named in such proclamation, he shall revoke such proclamation with respect to such state.

#### COMMERCE WITH STATES ENGAGED IN ARMED CONFLICT

SEC. 2. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful for any American vessel to carry any passengers or any articles or materials to any state named in such proclamation.

(b) Whoever shall violate any of the provisions of subsection (a) of this section or of any regulations issued thereunder shall, upon conviction thereof, be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the violation be by a corporation, organization, or association, each officer or director thereof participating in the violation shall be liable to the penalty herein prescribed.

(c) Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful to export or transport, or attempt to export or transport, or cause to be exported or transported, from the United States to any state named in such proclamation, any articles or materials (except copyrighted articles or materials) until all right, title, and interest therein shall have been transferred to some foreign government, agency, institution, association, partnership, corporation, or national. Issuance of a bill of lading under which title to the articles or materials to be exported or transported passes to a foreign purchaser unconditionally upon the delivery of such articles or materials to a carrier, shall constitute a transfer of all right, title, and interest therein within the meaning of this subsection. The shipper of such articles or materials shall be required to file with the collector of the port from or through which they are to be exported a declaration under oath that he has complied with the requirements of this subsection with respect to transfer of right, title, and interest in such articles or materials, and that he will comply with such rules and regulations as shall be promulgated from time to time. Any such declaration so filed shall be a conclusive estoppel against any claim of any citizen of the United States of right, title, or interest in such articles or materials, if such citizen had knowledge of the filing of such declaration; and the exportation or transportation of any articles or materials without filing the declaration required by this subsection shall be a conclusive estoppel against any claim of any citizen of the United States of right, title, or interest in such

articles or materials, if such citizen had knowledge of such violation. No loss incurred by any such citizen (1) in connection with the sale or transfer of right, title, and interest in any such articles or materials or (2) in connection with the exportation or transportation of any such copyrighted articles or materials, shall be made the basis of any claim put forward by the Government of the United States.

(d) Insurance written by underwriters on articles or materials included in shipments which are subject to restrictions under the provisions of this joint resolution, and on vessels carrying such shipments, shall not be deemed an American interest therein, and no insurance policy issued on such articles or materials, or vessels, and no loss incurred thereunder or by the owners of such vessels, shall be made the basis of any claim put forward by the Government of the United States.

(e) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

(f) The provisions of subsection (a) of this section shall not apply to transportation by American vessels on or over lakes, rivers, and inland waters bordering on the United States, or to transportation by aircraft on or over lands bordering on the United States; and the provisions of subsection (c) of this section shall not apply (1) to such transportation of any articles or materials other than articles listed in a proclamation referred to in or issued under the authority of section 12 (i), or (2) to any other transportation on or over lands bordering on the United States of any articles or materials other than articles listed in a proclamation referred to in or issued under the authority of section 12 (i); and the provisions of subsections (a) and (c) of this section shall not apply to the transportation referred to in this subsection and subsections (g) and (h) of any articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i) if the articles or materials so listed are to be used exclusively by American vessels, aircraft, or other vehicles in connection with their operation and maintenance.

(g) The provisions of subsections (a) and (c) of this section shall not apply to transportation by American vessels (other than aircraft) of mail, passengers, or any articles or materials (except articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i)) (1) to any port in the Western Hemisphere south of thirty-five degrees north latitude, (2) to any port in the Western Hemisphere north of thirty-five degrees north latitude and west of sixty-six degrees west longitude, (3) to any port on the Pacific or Indian Oceans,

including the China Sea, the Tasman Sea, the Bay of Bengal, and the Arabian Sea, and any other dependent waters of either of such oceans, seas, or bays, or (4) to any port on the Atlantic Ocean or its dependent waters south of thirty degrees north latitude. The exceptions contained in this subsection shall not apply to any such port which is included within a combat area as defined in section 3 which applies to such vessels.

(*h*) The provisions of subsections (*a*) and (*c*) of this section shall not apply to transportation by aircraft of mail, passengers, or any articles or materials (except articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (*i*)) (1) to any port in the Western Hemisphere, or (2) to any port on the Pacific or Indian Oceans, including the China Sea, the Tasman Sea, the Bay of Bengal, and the Arabian Sea, and any other dependent waters of either of such oceans, seas, or bays. The exceptions contained in this subsection shall not apply to any such port which is included within a combat area as defined in section 3 which applies to such aircraft.

(*i*) Every American vessel to which the provisions of subsections (*g*) and (*h*) apply, and every neutral vessel to which the provisions of subsection (*l*) apply, shall, before departing from a port or from the jurisdiction of the United States, file with the collector of customs of the port of departure, or if there is no such collector at such port then with the nearest collector of customs, a sworn statement (1) containing a complete list of all the articles and materials carried as cargo by such vessel, and the names and addresses of the consignees of all such articles and materials, and (2) stating the ports at which such articles and materials are to be unloaded and the ports of call of such vessel. All transportation referred to in subsections (*f*), (*g*), (*h*), and (*l*) of this section shall be subject to such restrictions, rules, and regulations as the President shall prescribe; but no loss incurred in connection with any transportation excepted under the provisions of subsections (*g*), (*h*), and (*l*) of this section shall be made the basis of any claim put forward by the Government of the United States.

(*j*) Whenever all proclamations issued under the authority of section 1 (*a*) shall have been revoked, the provisions of subsections (*f*), (*g*), (*h*), (*i*), and (*l*) of this section shall expire.

(*k*) The provisions of this section shall not apply to the current voyage of any American vessel which has cleared for a foreign port and has departed from a port or from the jurisdiction of the United States in advance of (1) the date of enactment of this joint resolution, or (2) any proclamation issued after such date under the authority of section 1 (*a*) of this joint resolution; but any such vessel shall proceed at its own risk

after either of such dates, and no loss incurred in connection with any such vessel or its cargo after either of such dates shall be made the basis of any claim put forward by the Government of the United States.

(*l*) The provisions of subsection (*c*) of this section shall not apply to the transportation by a neutral vessel to any port referred to in subsection (*g*) of this section of any articles or materials (except articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (*i*)) so long as such port is not included within a combat area as defined in section 3 which applies to American vessels.

### COMBAT AREAS

SEC. 3. (*a*) Whenever the President shall have issued a proclamation under the authority of section 1 (*a*), and he shall thereafter find that the protection of citizens of the United States so requires, he shall, by proclamation, define combat areas, and thereafter it shall be unlawful, except under such rules and regulations as may be prescribed, for any citizen of the United States or any American vessel to proceed into or through any such combat area. The combat areas so defined may be made to apply to surface vessels or aircraft, or both.

(*b*) In case of the violation of any of the provisions of this section by any American vessel, or any owner or officer thereof, such vessel, owner, or officer shall be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the owner of such vessel be a corporation, organization, or association, each officer or director participating in the violation shall be liable to the penalty hereinabove prescribed. In case of the violation of this section by any citizen traveling as a passenger, such passenger may be fined not more than \$10,000 or imprisoned for not more than two years, or both.

(*c*) The President may from time to time modify or extend any proclamation issued under the authority of this section, and when the conditions which shall have caused him to issue any such proclamation shall have ceased to exist he shall revoke such proclamation and the provisions of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation.

### AMERICAN RED CROSS

SEC. 4. The provisions of section 2 (*a*) shall not prohibit the transportation by vessels under charter or other direction and control of the American Red Cross, proceeding under safe conduct granted by states

named in any proclamation issued under the authority of section 1 (a), of officers and American Red Cross personnel, medical personnel, and medical supplies, food, and clothing, for the relief of human suffering.

#### TRAVEL ON VESSELS OF BELLIGERENT STATES

SEC. 5. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a) it shall thereafter be unlawful for any citizen of the United States to travel on any vessel of any state named in such proclamation, except in accordance with such rules and regulations as may be prescribed.

(b) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

#### ARMING OF AMERICAN MERCHANT VESSELS PROHIBITED

SEC. 6. Whenever the President shall have issued a proclamation under the authority of section 1 (a), it shall thereafter be unlawful, until such proclamation is revoked, for any American vessel, engaged in commerce with any foreign state, to be armed, except with small arms and ammunition therefor, which the President may deem necessary and shall publicly designate for the preservation of discipline aboard any such vessel.

#### FINANCIAL TRANSACTIONS

SEC. 7. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a), it shall thereafter be unlawful for any person within the United States to purchase, sell, or exchange bonds, securities, or other obligations of the government of any state named in such proclamation, or of any political subdivision of any such state, or of any person acting for or on behalf of the government of any such state, or political subdivision thereof, issued after the date of such proclamation, or to make any loan or extend any credit (other than necessary credits accruing in connection with the transmission of telegraph, cable, wireless and telephone services) to any such government, political subdivision, or person. The provisions of this subsection shall also apply to the sale by any person within the United States to any person in a state named in any such proclamation of any articles or materials listed in a proclamation referred to in or issued under the authority of section 12 (i).

(b) The provisions of this section shall not apply to a renewal or adjustment of such indebtedness as may exist on the date of such proclamation.

(c) Whoever shall knowingly violate any of the provisions of this section or of any regulations issued thereunder shall, upon conviction thereof, be fined not more than \$50,000 or imprisoned for not more than five years, or both. Should the violation be by a corporation, organization, or association, each officer or director thereof participating in the violation shall be liable to the penalty herein prescribed.

(d) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

#### SOLICITATION AND COLLECTION OF FUNDS AND CONTRIBUTIONS

SEC. 8. (a) Whenever the President shall have issued a proclamation under the authority of section 1 (a), it shall thereafter be unlawful for any person within the United States to solicit or receive any contribution for or on behalf of the government of any state named in such proclamation or for or on behalf of any agent or instrumentality of any such state.

(b) Nothing in this section shall be construed to prohibit the solicitation or collection of funds and contributions to be used for medical aid and assistance, or for food and clothing to relieve human suffering, when such solicitation or collection of funds and contributions is made on behalf of and for use by any person or organization which is not acting for or on behalf of any such government, but all such solicitations and collections of funds and contributions shall be in accordance with and subject to such rules and regulations as may be prescribed.

(c) Whenever any proclamation issued under the authority of section 1 (a) shall have been revoked with respect to any state the provisions of this section shall thereupon cease to apply with respect to such state, except as to offenses committed prior to such revocation.

#### AMERICAN REPUBLICS

SEC. 9. This joint resolution (except section 12) shall not apply to any American republic engaged in war against a non-American state or states, provided the American republic is not cooperating with a non-American state or states in such war.



## RESTRICTIONS ON USE OF AMERICAN PORTS

SEC. 10. (a) Whenever, during any war in which the United States is neutral, the President, or any person thereunto authorized by him, shall have cause to believe that any vessel, domestic or foreign, whether requiring clearance or not, is about to carry out of a port or from the jurisdiction of the United States, fuel, men, arms, ammunition, implements of war, supplies, dispatches, or information to any warship, tender, or supply ship of a state named in a proclamation issued under the authority of section 1 (a), but the evidence is not deemed sufficient to justify forbidding the departure of the vessel as provided for by section 1, title V, chapter 30, of the Act approved June 15, 1917 (40 Stat. 217, 221; U. S. C., 1934 edition, title 18, sec. 31), and if, in the President's judgment, such action will serve to maintain peace between the United States and foreign states, or to protect the commercial interests of the United States and its citizens, or to promote the security or neutrality of the United States, he shall have the power, and it shall be his duty, to require the owner, master, or person in command thereof, before departing from a port or from the jurisdiction of the United States, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that the vessel will not deliver the men, or any fuel, supplies, dispatches, information, or any part of the cargo, to any warship, tender, or supply ship of a state named in a proclamation issued under the authority of section 1 (a).

(b) If the President, or any person thereunto authorized by him, shall find that a vessel, domestic or foreign, in a port of the United States, has previously departed from a port or from the jurisdiction of the United States during such war and delivered men, fuel, supplies, dispatches, information, or any part of its cargo to a warship, tender, or supply ship of a state named in a proclamation issued under the authority of section 1 (a), he may prohibit the departure of such vessel during the duration of the war.

(c) Whenever the President shall have issued a proclamation under section 1 (a) he may, while such proclamation is in effect, require the owner, master, or person in command of any vessel, foreign or domestic, before departing from the United States, to give a bond to the United States, with sufficient sureties, in such amount as he shall deem proper, conditioned that no alien seaman who arrived on such vessel shall remain in the United States for a longer period than that permitted under the regulations, as amended from time to time, issued pursuant to section 33 of the Immigration Act of February 5, 1917 (U. S. C., title 8, sec. 168).

Notwithstanding the provisions of said section 33, the President may issue such regulations with respect to the landing of such seamen as he deems necessary to insure their departure either on such vessel or another vessel at the expense of such owner, master, or person in command.

#### SUBMARINES AND ARMED MERCHANT VESSELS

SEC. 11. Whenever, during any war in which the United States is neutral, the President shall find that special restrictions placed on the use of the ports and territorial waters of the United States by the submarines or armed merchant vessels of a foreign state will serve to maintain peace between the United States and foreign states, or to protect the commercial interests of the United States and its citizens, or to promote the security of the United States, and shall make proclamation thereof, it shall thereafter be unlawful for any such submarine or armed merchant vessel to enter a port or the territorial waters of the United States or to depart therefrom, except under such conditions and subject to such limitations as the President may prescribe. Whenever, in his judgment, the conditions which have caused him to issue his proclamation have ceased to exist, he shall revoke his proclamation and the provisions of this section shall thereupon cease to apply, except as to offenses committed prior to such revocation.

#### NATIONAL MUNITIONS CONTROL BOARD

SEC. 12. (a) There is hereby established a National Munitions Control Board (hereinafter referred to as the "Board"). The Board shall consist of the Secretary of State, who shall be chairman and executive officer of the Board, the Secretary of the Treasury, the Secretary of War, the Secretary of the Navy, and the Secretary of Commerce. Except as otherwise provided in this section, or by other law, the administration of this section is vested in the Secretary of State. The Secretary of State shall promulgate such rules and regulations with regard to the enforcement of this section as he may deem necessary to carry out its provisions. The Board shall be convened by the chairman and shall hold at least one meeting a year.

(b) Every person who engages in the business of manufacturing, exporting, or importing any arms, ammunition, or implements of war listed in a proclamation referred to in or issued under the authority of subsection (i) of this section, whether as an exporter, importer, manufacturer, or dealer, shall register with the Secretary of State his name, or

business name, principal place of business, and places of business in the United States, and a list of the arms, ammunition, and implements of war which he manufactures, imports, or exports.

(c) Every person required to register under this section shall notify the Secretary of State of any change in the arms, ammunition, or implements of war which he exports, imports, or manufactures; and upon such notification the Secretary of State shall issue to such person an amended certificate of registration, free of charge, which shall remain valid until the date of expiration of the original certificate. Every person required to register under the provisions of this section shall pay a registration fee of \$100. Upon receipt of the required registration fee, the Secretary of State shall issue a registration certificate valid for five years, which shall be renewable for further periods of five years upon the payment for each renewal of a fee of \$100; but valid certificates of registration (including amended certificates) issued under the authority of section 2 of the joint resolution of August 31, 1935, or section 5 of the joint resolution of August 31, 1935, as amended, shall, without payment of any additional registration fee, be considered to be valid certificates of registration issued under this subsection, and shall remain valid for the same period as if this joint resolution had not been enacted.

(d) It shall be unlawful for any person to export, or attempt to export, from the United States to any other state, any arms, ammunition, or implements of war listed in a proclamation referred to in or issued under the authority of subsection (i) of this section, or to import, or attempt to import, to the United States from any other state, any of the arms, ammunition, or implements of war listed in any such proclamation, without first having submitted to the Secretary of State the name of the purchaser and the terms of sale and having obtained a license therefor.

(e) All persons required to register under this section shall maintain, subject to the inspection of the Secretary of State, or any person or persons designated by him, such permanent records of manufacture for export, importation, and exportation of arms, ammunition, and implements of war as the Secretary of State shall prescribe.

(f) Licenses shall be issued by the Secretary of State to persons who have registered as herein provided for, except in cases of export or import licenses where the export of arms, ammunition, or implements of war would be in violation of this joint resolution or any other law of the United States, or of a treaty to which the United States is a party, in which cases such licenses shall not be issued; but a valid license issued under the authority of section 2 of the joint resolution of August 31,

1935, or section 5 of the joint resolution of August 31, 1935, as amended, shall be considered to be a valid license issued under this subsection, and shall remain valid for the same period as if this joint resolution had not been enacted.

(g) No purchase of arms, ammunition, or implements of war shall be made on behalf of the United States by any officer, executive department, or independent establishment of the Government from any person who shall have failed to register under the provisions of this joint resolution.

(h) The Board shall make a report to Congress on January 3 and July 3 of each year, copies of which shall be distributed as are other reports transmitted to Congress. Such reports shall contain such information and data collected by the Board as may be considered of value in the determination of questions connected with the control of trade in arms, ammunition, and implements of war, including the name of the purchaser and the terms of sale made under any such license. The Board shall include in such reports a list of all persons required to register under the provisions of this joint resolution, and full information concerning the licenses issued hereunder, including the name of the purchaser and the terms of sale made under any such license.

(i) The President is hereby authorized to proclaim upon recommendation of the Board from time to time a list of articles which shall be considered arms, ammunition, and implements of war for the purposes of this section; but the proclamation Numbered 2237, of May 1, 1937 (50 Stat. 1834), defining the term "arms, ammunition, and implements of war" shall, until it is revoked, have full force and effect as if issued under the authority of this subsection.

#### REGULATIONS

SEC. 13. The President may, from time to time, promulgate such rules and regulations, not inconsistent with law, as may be necessary and proper to carry out any of the provisions of this joint resolution; and he may exercise any power or authority conferred on him by this joint resolution through such officer or officers, or agency or agencies, as he shall direct.

#### UNLAWFUL USE OF THE AMERICAN FLAG

SEC. 14. (a) It shall be unlawful for any vessel belonging to or operating under the jurisdiction of any foreign state to use the flag of

the United States thereon, or to make use of any distinctive signs or markings, indicating that the same is an American vessel.

(b) Any vessel violating the provisions of subsection (a) of this section shall be denied for a period of three months the right to enter the ports or territorial waters of the United States except in cases of force majeure.

#### GENERAL PENALTY PROVISION

SEC. 15. In every case of the violation of any of the provisions of this joint resolution or of any rule or regulation issued pursuant thereto where a specific penalty is not herein provided, such violator or violators, upon conviction, shall be fined not more than \$10,000, or imprisoned not more than two years, or both.

#### DEFINITIONS

SEC. 16. For the purposes of this joint resolution—

(a) The term "United States," when used in a geographical sense, includes the several States and Territories, the insular possessions of the United States (including the Philippine Islands), the Canal Zone, and the District of Columbia.

(b) The term "person" includes a partnership, company, association, or corporation, as well as a natural person.

(c) The term "vessel" means every description of watercraft and aircraft capable of being used as a means of transportation on, under, or over water.

(d) The term "American vessel" means any vessel documented, and any aircraft registered or licensed, under the laws of the United States.

(e) The term "state" shall include nation, government, and country.

(f) The term "citizen" shall include any individual owning allegiance to the United States, a partnership, company, or association composed in whole or in part of citizens of the United States, and any corporation organized and existing under the laws of the United States as defined in subsection (a) of this section.

#### SEPARABILITY OF PROVISIONS

SEC. 17. If any of the provisions of this joint resolution, or the application thereof to any person or circumstance, is held invalid, the remainder of the joint resolution, and the application of such provision to other persons or circumstances, shall not be affected thereby.

## APPROPRIATIONS

SEC. 18. There is hereby authorized to be appropriated from time to time, out of any money in the Treasury not otherwise appropriated, such amounts as may be necessary to carry out the provisions and accomplish the purposes of this joint resolution.

## REPEALS

SEC. 19. The joint resolution of August 31, 1935, as amended, and the joint resolution of January 8, 1937, are hereby repealed; but offenses committed and penalties, forfeitures, or liabilities incurred under either of such joint resolutions prior to the date of enactment of this joint resolution may be prosecuted and punished, and suits and proceedings for violations of either of such joint resolutions or of any rule or regulation issued pursuant thereto may be commenced and prosecuted, in the same manner and with the same effect as if such joint resolutions had not been repealed.

## SHORT TITLE

SEC. 20. This joint resolution may be cited as the "Neutrality Act of 1939."

Approved, November 4, 1939, 12:04 p. m.

## 104. THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS

In 1934 Congress passed a joint resolution providing that, if the President should find that the prohibition of the sale of arms and munitions of war in the United States to Bolivia and Paraguay, then engaged in war, might contribute to the reestablishment of peace between those countries, and if he should issue a proclamation to that effect, it should thereafter be a criminal offense for anyone to make such sale. The validity of the resolution was attacked in the courts on the ground that it was an unconstitutional delegation of legislative power to the President. The Supreme Court, however, speaking through Mr. Justice Sutherland, upheld the validity of the resolution and the action of the President under it in an opinion construing very broadly the power of the President in the conduct of foreign relations.

[*United States v. Curtiss-Wright Export Corporation* (1936), 299 U. S. 304-333; 81 L. Ed. 255-270.]

. . . The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. The determination which we are called to make, therefore, is



whether the Joint Resolution, as applied to that situation, is vulnerable to attack under the rule that forbids a delegation of the law-making power. In other words, assuming (but not deciding) that the challenged delegation, if it were confined to internal affairs, would be invalid, may it nevertheless be sustained on the ground that its exclusive aim is to afford a remedy for a hurtful condition within foreign territory?

It will contribute to the elucidation of the question if we first consider the differences between the powers of the Federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.

The two classes of powers are different, both in respect of their origin and their nature. The broad statement that the Federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers *then possessed by the states* such portions as it was thought desirable to vest in the Federal government, leaving those not included in the enumeration still in the states.

. . . . .

Not only, as we have shown, is the Federal power over external affairs in origin and essential character different from that over internal affairs, but participation in the exercise of the power is significantly limited. In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power to speak or listen as a representative of the nation. He *makes* treaties with the advice and consent of the Senate; but he alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it. As Marshall said in his great argument of March 7, 1800, in the House of Representatives, "The President is the sole organ of the nation in its external relations, and its sole representative with foreign nations." . . .

. . . . .

It is important to bear in mind that we are here dealing not alone with an authority vested in the President by an exertion of legislative power, but with such an authority plus the very delicate, plenary and exclusive power of the President as the sole organ of the Federal government in the field of international relations—a power which does not require as a

basis for its exercise an act of Congress, but which, of course, like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution. It is quite apparent that if, in the maintenance of our international relations, embarrassment—perhaps serious embarrassment—is to be avoided and success for our aims achieved, congressional legislation which is to be made effective through negotiation and inquiry within the international field must often accord to the President a degree of discretion and freedom from statutory restriction which would not be admissible were domestic affairs alone involved. Moreover, he, not Congress, has the better opportunity of knowing the conditions which prevail in foreign countries, and especially is this true in time of war. He has his confidential sources of information. He has his agents in the form of diplomatic, consular and other officials. Secrecy in respect of information gathered by them may be highly necessary, and the premature disclosure of it productive of harmful results. Indeed, so clearly is this true that the first President refused to accede to a request to lay before the House of Representatives the instructions, correspondence and documents relating to the negotiation of the Jay Treaty—a refusal the wisdom of which was recognized by the House itself and has never since been doubted.

. . . . .

The marked difference between foreign affairs and domestic affairs in this respect is recognized by both houses of Congress in the very form of their requisitions for information from the executive departments. In the case of every department except the Department of State, the resolution *directs* the official to furnish the information. In the case of the State Department, dealing with foreign affairs, the President is requested to furnish the information “if not incompatible with the public interest.” A statement that to furnish the information is not compatible with the public interest rarely, if ever, is questioned.

When the President is to be authorized by legislation to act in respect of a matter intended to affect a situation in foreign territory, the legislator properly bears in mind the important consideration that the form of the President's action—or, indeed, whether he shall act at all—may well depend, among other things, upon the nature of the confidential information which he has or may thereafter receive, or upon the effect which his action may have upon our foreign relations. This consideration, in connection with what we have already said on the subject, discloses the unwisdom of requiring Congress in this field of governmental power to lay

down narrowly definite standards by which the President is to be governed.

. . . . .

In the light of the foregoing observations, it is evident that this court should not be in haste to apply a general rule which will have the effect of condemning legislation like that under review as constituting an unlawful delegation of legislative power. The principles which justify such legislation find overwhelming support in the unbroken legislative practice which has prevailed almost from the inception of the national government to the present day.

. . . . .

. . . It is enough to summarize by saying that, both upon principle and in accordance with precedent, we conclude there is sufficient warrant for the broad discretion vested in the President to determine whether the enforcement of the statute will have a beneficial effect upon the reestablishment of peace in the affected countries; whether he shall make proclamation to bring the resolution into operation; whether and when the resolution shall cease to operate and to make proclamation accordingly; and to prescribe limitations and exceptions to which the enforcement of the resolution shall be subject.

### 105. OPEN DOOR POLICY

At the close of the nineteenth century a scramble took place among European powers to secure concessions, leased territories, and spheres of influence in China. If this process of dismemberment of China continued unchecked, the principle of equal opportunity for trade would be largely destroyed. At this juncture, in September, 1899, Secretary of State John Hay dispatched a circular note to the European powers expressing the views of the United States regarding the situation in China and requesting those governments to indicate their approval of the principle of the open door set forth therein.

[Malloy, *Treaties, Conventions, etc. between the United States and other Powers, 1776-1909*, vol. I, pp. 246-247.]

Earnestly desirous to remove any cause of irritation and to insure at the same time to the commerce of all nations in China the undoubted benefits which should accrue from a formal recognition by the various powers claiming "spheres of interest" that they shall enjoy perfect equality of treatment for their commerce and navigation within such "spheres," the Government of the United States would be pleased to see His German Majesty's Government give formal assurances and lend

its cooperation in securing like assurances from the other interested powers that each within its respective sphere of whatever influence—

First. Will in no way interfere with any treaty port or any vested interest within any so-called “sphere of interest” or leased territory it may have. . . .

Second. That the Chinese treaty tariff of the time being shall apply to all merchandise landed or shipped to all such ports as are within said “sphere of interest” (unless they be “free ports”), no matter to what nationality it may belong, and . . . shall be collected by the Chinese Government.

Third. That it will levy no higher harbor dues on vessels of another nationality . . . than shall be levied on vessels of its own nationality, and no higher railroad charges . . . on merchandise belonging to citizens or subjects of other nationalities . . . belonging to its own nationals transported over equal distances.

## 106. POLICY WITH RESPECT TO AGGRESSION

In 1931 Japan, in violation of her treaty obligations, invaded Manchuria and set up the puppet state of Manchukuo. Neither the United States nor the European powers were prepared to extend material assistance to China to prevent this aggression, but the United States took the lead in refusing to recognize the new state, and this position was endorsed and supported by the League of Nations. This action, although of great importance as a declaration of policy, did not prevent the continuance of aggression in the Far East and in other parts of the world, and President Roosevelt, in 1937 strongly urged the need for “quarantining” aggressor nations. Just how this principle was to be implemented, however, was left to future determination, and Congress and probably a majority of the American people seemed to prefer a policy of strict neutrality.

### a. Doctrine of Non-Recognition

[Statement by Secretary of State Stimson, in *State Department Press Releases*, Jan. 9, 1932, pp. 41-42.]

. . . The American Government continues confident that the work of the neutral commission recently authorized by the Council of the League of Nations will facilitate an ultimate solution of the difficulties now existing between China and Japan. But in view of the present situation and of its own rights and obligations therein, the American Government deems it to be its duty to notify both the Imperial Japanese Government and the Government of the Chinese Republic that it can not admit the legality of any situation *de facto* nor does it intend to recognize any treaty or agreement entered into between those Governments, or agents

thereof, which may impair the treaty rights of the United States or its citizens in China, including those which relate to the sovereignty, the independence, or the territorial and administrative integrity of the Republic of China, or to the international policy relative to China, commonly known as the open-door policy; and that it does not intend to recognize any situation, treaty, or agreement which may be brought about by means contrary to the covenants and obligations of the Pact of Paris of August 27, 1928, to which treaty both China and Japan, as well as the United States, are parties.

### **b. Proposal for Quarantining Aggressors**

[Address of President F. D. Roosevelt, in Chicago, Oct. 5, 1937. Text in *State Department Press Releases*, Oct. 9, 1937, pp. 277-279.]

. . . The peace-loving nations must make a concerted effort in opposition to those violations of treaties and those ignorings of humane instincts which today are creating a state of international anarchy and instability from which there is no escape through mere isolation or neutrality.

Those who cherish their freedom and recognize and respect the equal right of their neighbors to be free and live in peace, must work together for the triumph of law and moral principles in order that peace, justice, and confidence may prevail in the world. There must be a return to a belief in the pledged word, in the value of a signed treaty. There must be recognition of the fact that national morality is as vital as private morality.

. . . There is a solidarity and interdependence about the modern world, both technically and morally, which makes it impossible for any nation completely to isolate itself from economic and political upheavals in the rest of the world, especially when such upheavals appear to be spreading and not declining. There can be no stability or peace either within nations or between nations except under laws and moral standards adhered to by all. International anarchy destroys every foundation for peace. It jeopardizes either the immediate or the future security of every nation, large or small. It is, therefore, a matter of vital interest and concern to the people of the United States that the sanctity of international treaties and the maintenance of international morality be restored.

The overwhelming majority of the peoples and nations of the world today want to live in peace. They seek the removal of barriers against

trade. They want to exert themselves in industry, in agriculture, and in business, that they may increase their wealth through the production of wealth-producing goods rather than striving to produce military planes and bombs and machine guns and cannon for the destruction of human lives and useful property.

In those nations of the world which seem to be piling armament on armament for purposes of aggression, and those other nations which fear acts of aggression against them and their security, a very high proportion of their national income is being spent directly for armaments. It runs from 30 to as high as 50 percent.

The proportion that we in the United States spend is far less—11 or 12 percent.

How happy we are that the circumstances of the moment permit us to put our money into bridges and boulevards, dams and reforestation, the conservation of our soil, and many other kinds of useful works rather than into huge standing armies and vast supplies of implements of war.

I am compelled and you are compelled, nevertheless, to look ahead. The peace, the freedom, and the security of 90 percent of the population of the world is being jeopardized by the remaining 10 percent, who are threatening a breakdown of all international order and law. Surely the 90 percent who want to live in peace under law and in accordance with moral standards that have received almost universal acceptance through the centuries, can and must find some way to make their will prevail.

The situation is definitely of universal concern. The questions involved relate not merely to violations of specific provisions of particular treaties; they are questions of war and of peace, of international law, and especially of principles of humanity. It is true that they involve definite violations of agreements, and especially of the Covenant of the League of Nations, the Briand-Kellogg Pact, and the Nine Power Treaty. But they also involve problems of world economy, world security, and world humanity.

It is true that the moral consciousness of the world must recognize the importance of removing injustices and well-founded grievances; but at the same time it must be aroused to the cardinal necessity of honoring sanctity of treaties, of respecting the rights and liberties of others, and of putting an end to acts of international aggression.

It seems to be unfortunately true that the epidemic of world lawlessness is spreading.

When an epidemic of physical disease starts to spread, the community approves and joins in a *quarantine* of the patients in order to protect the health of the community against the spread of the disease.



It is my determination to pursue a policy of peace and to adopt every practicable measure to avoid involvement in war. It ought to be inconceivable that in this modern era, and in the face of experience, any nation could be so foolish and ruthless as to run the risk of plunging the whole world into war by invading and violating in contravention of solemn treaties the territory of other nations that have done them no real harm and which are too weak to protect themselves adequately. Yet the peace of the world and the welfare and security of every nation is today being threatened by that very thing.

No nation which refuses to exercise forbearance and to respect the freedom and rights of others can long remain strong and retain the confidence and respect of other nations. No nation ever loses its dignity or good standing by conciliating its differences and by exercising great patience with and consideration for the rights of other nations.

War is a contagion, whether it be declared or undeclared. It can engulf states and peoples remote from the original scene of hostilities. We are determined to keep out of war, yet we cannot insure ourselves against the disastrous effects of war and the dangers of involvement. We are adopting such measures as will minimize our risk of involvement, but we cannot have complete protection in a world of disorder in which confidence and security have broken down.

If civilization is to survive the principles of the Prince of Peace must be restored. Shattered trust between nations must be revived.

Most important of all, the will for peace on the part of peace-loving nations must express itself to the end that nations that may be tempted to violate their agreements and the rights of others will desist from such a cause. There must be positive endeavors to preserve peace.

America hates war. America hopes for peace. Therefore, America actively engages in the search for peace.

### 107. SENATE RESERVATIONS TO THE LEAGUE OF NATIONS

One of President Wilson's famous fourteen points was that "a general association of nations must be formed under specific covenants, for the purpose of affording mutual guarantees of political independence and territorial integrity to great and small states alike." In order to carry out this plan there was inserted in the Treaty of Versailles an article known as the Covenant of the League of Nations, providing for an international organization composed of a council, an assembly, and other organs. One reason for the insertion of the Covenant in the Treaty was that it was thought that by combining the two proposals in one document it would make it easier to obtain the adoption of the Covenant by the various nations. As far as the United States was concerned, however, this expectation

failed to be realized, since the treaty containing the Covenant did not receive the approval of the necessary majority in the Senate. An unsuccessful attempt to render the Covenant satisfactory to the Senate was made through attaching certain reservations, which indicate by implication some of the objections raised in the Senate against the Covenant. These reservations, as finally voted upon in the Senate on March 19, 1920, are as follows.

[*Congressional Record*, vol. 59, p. 4599.]

## RESOLUTION OF RATIFICATION

*Resolved* (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Treaty of Peace with Germany concluded at Versailles on the 28th day of June, 1919, subject to the following reservations and understandings, which are hereby made a part and condition of this resolution of ratification, which ratification is not to take effect or bind the United States until the said reservations and understandings adopted by the Senate have been accepted as a part and a condition of this resolution of ratification by the Allied and Associated Powers and a failure on the part of the Allied and Associated Powers to make objection to said reservations and understandings prior to the deposit of ratification by the United States shall be taken as a full and final acceptance of such reservations and understandings by said powers:

1. The United States so understands and construes Article 1 that in case of notice of withdrawal from the League of Nations, as provided in said article, the United States shall be the sole judge as to whether all its international obligations and all its obligations under the said Covenant have been fulfilled, and notice of withdrawal by the United States may be given by a concurrent resolution of the Congress of the United States.

2. The United States assumes no obligation to preserve the territorial integrity or political independence of any other country by the employment of its military or naval forces, its resources, or any form of economic discrimination, or to interfere in any way in controversies between nations, including all controversies relating to territorial integrity or political independence, whether members of the League or not, under the provisions of Article 10, or to employ the military or naval forces of the United States, under any article of the treaty for any purpose, unless in any particular case the Congress, which, under the Constitution, has the sole power to declare war or authorize the employment of the military or naval forces of the United States, shall, in the exercise of full liberty of action, by act or joint resolution so provide.

3. No mandate shall be accepted by the United States under Article 22,

Part 1, or any other provision of the Treaty of Peace with Germany, except by action of the Congress of the United States.

4. The United States reserves to itself exclusively the right to decide what questions are within its domestic jurisdiction and declares that all domestic and political questions relating wholly or in part to its internal affairs, including immigration, labor, coastwise traffic, the tariff, commerce, the suppression of traffic in women and children and in opium and other dangerous drugs, and all other domestic questions, are solely within the jurisdiction of the United States and are not under this treaty to be submitted in any way either to arbitration or to the consideration of the Council or of the Assembly of the League of Nations, or any agency thereof, or to the decision or recommendation of any other power.

5. The United States will not submit to arbitration or to inquiry by the Assembly or by the Council of the League of Nations, provided for in said treaty of peace, any questions which in the judgment of the United States depend upon or relate to its long-established policy, commonly known as the Monroe Doctrine; said doctrine is to be interpreted by the United States alone and is hereby declared to be wholly outside the jurisdiction of said League of Nations and entirely unaffected by any provision contained in the said Treaty of Peace with Germany.

6. The United States withholds its assent to Articles 156, 157, and 158, and reserves full liberty of action with respect to any controversy which may arise under said articles.

7. No person is or shall be authorized to represent the United States, nor shall any citizen of the United States be eligible, as a member of any body or agency established or authorized by said Treaty of Peace with Germany, except pursuant to an act of the Congress of the United States providing for his appointment and defining his powers and duties.

8. The United States understands that the reparation commission will regulate or interfere with exports from the United States to Germany, or from Germany to the United States, only when the United States by act or joint resolution of Congress approves such regulation or interference.

9. The United States shall not be obligated to contribute to any expenses of the League of Nations, or of the secretariat, or of any commission, or committee, or conference, or other agency, organized under the League of Nations or under the treaty or for the purpose of carrying out the treaty provisions, unless and until an appropriation of funds available for such expenses shall have been made by the Congress of the United States: *Provided*, That the foregoing limitation shall not apply to the United States' proportionate share of the expense of the office force and salary of the secretary-general.

10. No plan for the limitation of armaments proposed by the Council of the League of Nations under the provisions of Article 8 shall be held as binding the United States until the same shall have been accepted by Congress, and the United States reserves the right to increase its armament without the consent of the Council whenever the United States is threatened with invasion or engaged in war.

11. The United States reserves the right to permit, in its discretion, the nationals of a covenant-breaking State, as defined in Article 16 of the Covenant of the League of Nations, residing within the United States or in countries other than such covenant-breaking State, to continue their commercial, financial, and personal relations with the nationals of the United States.

12. Nothing in Articles 296, 297, or in any of the annexes thereto or in any other article, section, or annex of the Treaty of Peace with Germany shall, as against citizens of the United States, be taken to mean any confirmation, ratification or approval of any act otherwise illegal or in contravention of the rights of citizens of the United States.

13. The United States withholds its assent to Part XIII (Articles 387 to 427, inclusive) unless Congress by act or joint resolution shall hereafter make provision for representation in the organization established by said Part XIII, and in such event the participation of the United States will be governed and conditioned by the provisions of such act or joint resolution.

14. Until Part I, being the Covenant of the League of Nations, shall be so amended as to provide that the United States shall be entitled to cast a number of votes equal to that which any member of the League and its self-governing dominions, colonies, or parts of empire, in the aggregate shall be entitled to cast, the United States assumes no obligation to be bound except in cases where Congress has previously given its consent, by any election, decision, report, or finding of the Council or Assembly in which any member of the League and its self-governing dominions, colonies, or parts of empire, in the aggregate have cast more than one vote.

The United States assumes no obligation to be bound by any decision, report, or finding of the Council or Assembly arising out of any dispute between the United States and any member of the League if such member, or any self-governing dominion, colony, empire, or part of empire united with it politically has voted.

15. In consenting to the ratification of the Treaty with Germany the United States adheres to the principle of self-determination and to the resolution of sympathy with the aspirations of the Irish people for a

government of their own choice adopted by the Senate June 6, 1919, and declares that when such government is attained by Ireland, a consummation it is hoped is at hand, it should promptly be admitted as a member of the League of Nations.

### 108. THE REORGANIZED FOREIGN SERVICE

Until 1924 our foreign service was sharply differentiated into diplomatic and consular branches. Although the duties of the two branches were to some extent similar and an officer in one branch might display abilities making it desirable to transfer him to the other branch, such transfer was impracticable without the formality of a new appointment. The lack of uniformity in the salary scale of the two branches was another difficulty in the way of desirable transfers and of effecting greater elasticity and mobility in the service. In order to remedy these difficulties and to effect other reforms in the foreign service, Congress passed the Rogers Act which went into effect on July 1, 1924. This act was an important step in advance toward placing our foreign service upon a more efficient basis. Experience under it showed, however, that a number of relatively minor changes in the law were desirable, such as provision for representation and post allowances and for reorganization of the foreign service personnel board. These changes were made and the law generally revised in 1931 through the enactment of the Moses-Linthicum Act, which thus became the organic law of the American foreign service.

[Public No. 715, 71st Congress (H. R. 9110).]

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

• • • • •

SEC. 2. Appointments to the grade of senior clerks and advancement from class to class in that grade shall hereafter be by promotion for efficient service, and no one shall be promoted to the grade of senior clerk who is not an American citizen and has not served as a clerk in a diplomatic mission or a consulate, or both, or as a clerk in the Department of State for at least five years.

SEC. 3. That the Secretary of State is hereby authorized, at posts where in his judgment it is required by the public interests for the purpose of meeting the unusual or excessive costs of living ascertained by him to exist, to grant compensation to clerks assigned there in addition to the basic rates herein specified, within such appropriations as Congress may make for such purpose: *Provided, however,* That all such additional compensation with the reasons therefor shall be reported to Congress with the annual Budget.

SEC. 4. No clerk who is not an American citizen shall hereafter be appointed to serve in a diplomatic mission.

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SEC. 8. That hereafter the Diplomatic and Consular Service of the United States shall be known as the Foreign Service of the United States.

SEC. 9. That the official designation 'Foreign Service officers,' as employed throughout this Act, shall be deemed to denote permanent officers in the Foreign Service below the grade of minister, all of whom are subject to promotion on merit and who may be appointed to either diplomatic or consular positions or assigned to serve in the Department of State subject to section 21 of this Act, at the discretion of the President.

SEC. 10. That the officers in the Foreign Service shall hereafter be graded and classified as follows with the salaries of each class herein affixed thereto, except as increases in salaries are authorized in section 33 of this Act, but not exceeding in number for each class a proportion of the total number of officers in the service represented in the following percentage limitations:

"Ambassadors and ministers as now or hereafter provided: Foreign Service officers as follows: Class I, 6 per centum, \$9,000 to \$10,000; class 2, 7 per centum, \$8,000 to \$8,900; class 3, 8 per centum, \$7,000 to \$7,900; class 4, 9 per centum, \$6,000 to \$6,900; class 5, 10 per centum, \$5,000 to \$5,900; class 6, 14 per centum, \$4,500 to \$4,900; class 7, \$4,000 to \$4,400; class 8, \$3,500 to \$3,900; unclassified, \$2,500 to \$3,400; *Provided*, That as many Foreign Service officers above class 6 as may be required for the purpose of inspection may be detailed by the Secretary of State for that purpose."

SEC. 11. That Foreign Service officers may be commissioned as diplomatic or consular officers or both: *Provided*, That all such appointments shall be made by and with the advice and consent of the Senate: *And provided further*, That all official acts of such officers while serving under diplomatic or consular commissions in the Foreign Service shall be performed under their respective commissions as secretaries or as consular officers.

SEC. 12. That hereafter appointments to the position of Foreign Service officer shall be made after examination and officers so appointed shall serve a suitable period of probation in an unclassified grade or, under such rules and regulations as the President may prescribe, after five years of continuous service in an executive or quasi-executive position in the Department of State, by transfer therefrom, *Provided*, That no candidate shall be eligible for examination for Foreign Service officer who is not an American citizen and who shall not have been such at least fifteen years: *Provided further*, That reinstatement of Foreign Service officers separated from the classified service by reason of appointment to some other position in the Government service may be made by Execu-



tive order of the President under such rules and regulations as he may prescribe. Except that the number of such officers reinstated shall not affect the number of the percentage of the class provided in section 10.

All appointments of Foreign Service officers shall be by commission to a class and not by a commission to a particular post, and such officers shall be assigned to posts and may be transferred from one post to another by order of the President as the interests of the service may require: *Provided*, That the classification of secretaries in the Diplomatic Service and of consular officers is hereby abolished without, however, in any wise impairing the validity of the present commissions of secretaries and consular officers.

. . . . .

SEC. 14. That the Secretary of State is directed to report from time to time to the President, along with his recommendations, the names of those Foreign Service officers who by reason of efficient service have demonstrated special capacity for promotion to the grade of minister and the names of those Foreign Service officers and clerks and officers and employees in the Department of State who by reason of efficient service, an accurate record of which shall be kept in the Department of State, have demonstrated special efficiency, and also the names of persons found upon taking the prescribed examination to have fitness for appointment to the service, and any Foreign Service officer who may hereafter be promoted to a higher class within the classification prescribed in section 10 of this Act shall have the status and receive the compensation attaching to such higher class from the date stated in his commission as the effective date of his promotion to such higher class.

. . . . .

SEC. 19. That under such regulations as the President may prescribe, and within the limitations of such appropriations as may be made therefor, which appropriations are hereby authorized, ambassadors, ministers, diplomatic, consular, and Foreign Service officers may be granted allowances for representation; and also post allowances wherever the cost of living may be proportionately so high that in the opinion of the Secretary of State such allowances are necessary to enable such diplomatic, consular, and Foreign Service officers to carry on their work efficiently: *Provided*, That all such allowances shall be accounted for to the Secretary of State in such manner and under such rules and regulations as the President may prescribe and the authorization and approval of such expenditures by the Secretary of State, as complying with such rules and regulations, shall be binding upon all officers of the Government:

*Provided further*, That the Secretary of State shall report all such expenditures annually to the Congress with the Budget estimates of the Department of State.

. . . . .

SEC. 21. That any Foreign Service officer may be assigned for duty in the Department of State without loss of class or salary, such assignment to be for a period of not more than three years, unless the public interests demand further service, when such assignment may be extended for a period not to exceed one year.

. . . . .

SEC. 24. That within the discretion of the President, any Foreign Service officer may be assigned to act as commissioner, chargé d'affaires, minister resident, or diplomatic agent for such period as the public interests may require without loss of grade, class, or salary: *Provided*, however, That no such officer shall receive more than one salary.

. . . . .

SEC. 26. The President is authorized to prescribe rules and regulations for the establishment of a Foreign Service retirement and disability system to be administered under the direction of the Secretary of State. . . .

. . . . .

SEC. 30. That there is hereby established in the Department of State the office of legal adviser (in lieu of the Solicitor of the Department of State, which officer is hereby abolished). The legal adviser shall be appointed by the President by and with the advice and consent of the Senate and shall receive the same salary as Assistant Secretaries of State.

SEC. 31. There shall be in the Department of State a Board of Foreign Service Personnel for the Foreign Service, whose duty it shall be to recommend promotions in the Foreign Service and to furnish the Secretary of State with lists of Foreign Service officers who have demonstrated special capacity for promotion to the grade of minister. The board shall be composed of not more than three Assistant Secretaries of State, one of whom shall be the Assistant Secretary of State having supervision over the Division of Foreign Service Personnel, who shall be chairman. The Chief of the Division of Foreign Service Personnel and one other member of the division may attend the meetings of the board and one of them shall act as secretary, but they shall not be entitled to vote in its proceedings. No Foreign Service officer below class 1 shall be assigned for duty in the Division of Foreign Service Personnel.

Foreign Service officers assigned to the division shall not be eligible for recommendation by the Board of Foreign Service Personnel for promotion to the grade of minister or ambassador during the period of such assignment or for three years thereafter, nor shall such officers be given any authority, except of a purely advisory character, over promotions, demotions, transfers, or separations from the service of Foreign Service officers.

SEC. 32. The Division of Foreign Service Personnel shall assemble, record, and be the custodian of all available information in regard to the character, ability, conduct, quality of work, industry, experience, dependability and general availability of Foreign Service officers, including reports of inspecting officers and efficiency reports of supervising officers. All such information shall be appraised at least once in two years and the result of such appraisal expressed in terms of excellent, very good, satisfactory, or unsatisfactory, accompanied by a concise statement of the considerations upon which they are based, shall be entered upon records to be known as the efficiency records of the officers, and shall constitute their efficiency ratings for the period. No charges against an officer that would adversely affect his efficiency rating or his value to the service, if true, shall be taken into consideration in determining his efficiency rating except after the officer shall have had opportunity to reply thereto. The Assistant Secretary of State supervising the Division of Foreign Service Personnel shall be responsible for the keeping of accurate and impartial efficiency records of Foreign Service officers and shall take all measures necessary to ensure their accuracy and impartiality. Not later than November 1 at least every two years, the Division of Foreign Service Personnel shall, under the supervision of the Assistant Secretary of State, prepare a list in which all Foreign Service officers shall be graded in accordance with their relative efficiency and value to the service. In this list officers shall be graded as excellent, very good, satisfactory, or unsatisfactory with such further subclassification as may be found necessary. All officers rated satisfactory or above shall be eligible for promotion in the order of merit to the minimum salary of the next higher class.

## 109. OUTLAWRY OF WAR

At the suggestion of M. Briand, French Foreign Minister, negotiations were entered into in 1927 looking toward the making of an international agreement for the renunciation of war as an instrument of national policy. As a result of these negotiations, an agreement was finally reached of which fifteen nations became original signatories, and to which virtually all the other independent nations of the

world later adhered. This pact, commonly called the Briand-Kellogg Anti-War Pact, or Pact for the Outlawry of War, was signed in August, 1928, was approved by the United States Senate in January, 1929, and was proclaimed to be in force in July of that year. It did not, however, abolish resort to defensive war, and has proved to be a failure in preventing any war at all.

[*U. S. Treaty Series*, No. 796.]

[Preamble is omitted.]

ART. I. The High Contracting Parties solemnly declare in the names of their respective peoples that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another.

ART. II. The . . . Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.

## CHAPTER XVIII

### GOVERNMENT OF TERRITORIES AND POSSESSIONS

#### 110. NORTHWEST ORDINANCE

Attention has previously been called to the difficulty of agreeing to the Articles of Confederation on account of the conflicting claims to western lands. This difficulty was solved by the cession of all these lands to the United States, thus giving to the general government the vast domain known as the Northwest Territory. With its acquisition came the problem of providing a government, and several plans were proposed, including one by Jefferson. The result was the enactment, in 1787, of the so-called Northwest Ordinance, which is notable, therefore, as the first act providing a territorial government in the United States. The Northwest Ordinance was continued in effect by the first Congress under the Constitution, and its underlying principles have been generally applied since in the government of territories.

[Text in MacDonald, *Documentary Source-Book of American History, 1606-1926* (The Macmillan Company), pp. 210-216.]

*An Ordinance for the government of the territory of the United States northwest of the river Ohio.*

SECTION 1. *Be it ordained by the United States in Congress assembled,* That the said territory, for the purposes of temporary government, be one district, subject, however, to be divided into two districts, as future circumstances may, in the opinion of Congress, make it expedient.

[Section 2 relates to the descent and distribution of estates.]

SEC. 3. *Be it ordained by the authority aforesaid,* That there shall be appointed, from time to time, by Congress, a governor, whose commission shall continue in force for the term of three years, unless sooner revoked by Congress; he shall reside in the district, and have a freehold estate therein in one thousand acres of land, while in the exercise of his office.

SEC. 4. There shall be appointed from time to time, by Congress, a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district, and have a freehold estate therein, in five hundred acres of land, while in the exercise of his office. It shall be his duty to keep and preserve the acts and laws passed by the legislature, and the public records of the district, and the proceed-



ings of the governor in his executive department, and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court, to consist of three judges, any two of whom to form a court, who shall have a common-law jurisdiction, and reside in the district, and have each therein a freehold estate, in five hundred acres of land, while in the exercise of their offices; and their commissions shall continue in force during good behavior.

SEC. 5. The governor and judges, or a majority of them, shall adopt and publish in the district such laws of the original States, criminal and civil, as may be necessary, and best suited to the circumstances of the district, and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

SEC. 6. The governor, for the time being, shall be commander-in-chief of the militia, appoint and commission all officers in the same below the rank of general officers; all general officers shall be appointed and commissioned by Congress.

SEC. 7. Previous to the organization of the general assembly the governor shall appoint such magistrates, and other civil officers, in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general assembly shall be organized the powers and duties of the magistrates and other civil officers shall be regulated and defined by the said assembly; but all magistrates and other civil officers, not herein otherwise directed, shall, during the continuance of this temporary government, be appointed by the governor.

SEC. 8. For the prevention of crimes and injuries, the laws to be adopted or made shall have force in all parts of the district, and for the execution of process, criminal and civil, the governor shall make proper divisions thereof; and he shall proceed, from time to time, as circumstances may require, to lay out the parts of the district in which the Indian titles shall have been extinguished, into counties and townships, subject, however, to such alterations as may thereafter be made by the legislature.

SEC. 9. So soon as there shall be five thousand free male inhabitants, of full age, in the district, upon giving proof thereof to the governor, they shall receive authority, with time and place, to elect representatives from their counties or townships, to represent them in the general assembly: *Provided*, That for every five hundred free male inhabitants there shall be one representative, and so on, progressively, with the number of free male inhabitants, shall the right of representation increase,



until the number of representatives shall amount to twenty-five; after which the number and proportion of representatives shall be regulated by the legislature: *Provided*, That no person be eligible or qualified to act as a representative, unless he shall have been a citizen of one of the United States three years, and be a resident in the district, or unless he shall have resided in the district three years; and, in either case, shall likewise hold in his own right, in fee-simple, two hundred acres of land within the same: *Provided, also*, That a freehold in fifty acres of land in the district, having been a citizen of one of the States, and being resident in the district, or the like freehold and two years' residence in the district, shall be necessary to qualify a man as an elector of a representative.

SEC. 10. The representatives thus elected shall serve for the term of two years; and in case of the death of a representative, or removal from office, the governor shall issue a writ to the county or township, for which he was a member, to elect another in his stead, to serve for the residue of the term.

SEC. 11. The general assembly, or legislature, shall consist of the governor, legislative council, and a house of representatives. The legislative council shall consist of five members, to continue in office five years, unless sooner removed by Congress; any three of whom to be a quorum; and the members of the council shall be nominated and appointed in the following manner, to wit: As soon as representatives shall be elected the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons, residents in the district, and each possessed of a freehold in five hundred acres of land, and return their names to Congress, five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council, by death or removal from office, the house of representatives shall nominate two persons, qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term; and every five years, four months at least before the expiration of the time of service of the members of council, the said house shall nominate ten persons, qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared. And all bills, having passed by a majority in the house, and by a majority in the council, shall be referred to the governor for his assent; but no bill,

or legislative act whatever, shall be of any force without his assent. The governor shall have power to convene, prorogue, and dissolve the general assembly when, in his opinion, it shall be expedient.

SEC. 12. [The governor and other officers to take an oath.] As soon as a legislature shall be formed in the district, the council and house assembled, in one room, shall have authority, by joint ballot, to elect a delegate to Congress who shall have a seat in Congress, with a right of debating, but not of voting, during this temporary government.

SEC. 13. And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions, are erected; to fix and establish those principles as the basis of all laws, constitutions, and governments, which forever hereafter shall be formed in the said territory; to provide, also, for the establishment of States, and permanent government therein, and for their admission to a share in the Federal councils on an equal footing with the original States, at as early periods as may be consistent with the general interest:

SEC. 14. It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit:

#### ARTICLE I

No person, demeaning himself in a peaceable and orderly manner, shall ever be molested on account of his mode of worship, or religious sentiments, in the said territories.

#### ARTICLE II

The inhabitants of the said territory shall always be entitled to the benefits of the writ of *habeas corpus*, and of the trial by jury; of a proportionate representation of the people in the legislature, and of judicial proceedings according to the course of common law. All persons shall be bailable, unless for capital offences, where the proof shall be evident, or the presumption great. All fines shall be moderate; and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and de-

clared, that no law ought ever to be made or have force in the said territory, that shall, in any manner whatever, interfere with or affect private contracts, or engagements, *bona fide*, and without fraud previously formed.

#### ARTICLE III

Religion, morality, and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians; their lands and property shall never be taken from them without their consent; and in their property, rights, and liberty they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall, from time to time, be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

#### ARTICLE IV

The said territory, and the States which may be formed therein, shall forever remain a part of this confederacy of the United States of America, subject to the articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the acts and ordinances of the United States in Congress assembled, conformable thereto. The inhabitants and settlers in the said territory shall be subject to pay a part of the Federal debts, contracted, or to be contracted, and a proportional part of the expenses of government to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district, or districts, or new States, as in the original States, within the time agreed upon by the United States in Congress assembled. The legislatures of those districts, or new States, shall never interfere with the primary disposal of the soil by the United States in Congress assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the *bona fide* purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non-resident proprietors be taxed higher than residents. The navigable waters leading into the Mississippi and Saint Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other States that may be admitted into the confederacy, without any tax, impost, or duty therefor.

## ARTICLE V

There shall be formed in the said territory not less than three nor more than five States; and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The western State, in the said territory, shall be bounded by the Mississippi, the Ohio, and the Wabash Rivers; a direct line drawn from the Wabash and Post Vincents, due north, to the territorial line between the United States and Canada; and by the said territorial line to the Lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from Post Vincents to the Ohio, by the Ohio, by a direct line drawn due north from the mouth of the Great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last-mentioned direct line, the Ohio, Pennsylvania, and the said territorial line: *Provided, however,* And it is further understood and declared, that the boundaries of these three States shall be subject so far to be altered, that, if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of Lake Michigan. And whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted, by its delegates, into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government: *Provided,* The constitution and government, so to be formed, shall be republican, and in conformity to the principles contained in these articles, and, so far as it can be consistent with the general interest of the confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free inhabitants in the State than sixty thousand.

## ARTICLE VI

There shall be neither slavery nor involuntary servitude in the said territory, otherwise than in the punishment of crimes, whereof the party shall have been duly convicted: *Provided always,* That any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed, and conveyed to the person claiming his or her labor or service as aforesaid.

. . . . .

## 111. INSULAR CASES

The power to govern territory belonging to the United States is clearly vested in Congress. The scope of that power has, however, been the subject of considerable controversy. This has centered especially around the question whether Congress is bound, in its government of such territory, by the ordinary constitutional limitations, a question which has been commonly put in this form: "Does the Constitution follow the flag?" In the *Dred Scott* case, decided in 1857, the Supreme Court held that these constitutional limitations did apply, and that Congress could not therefore prohibit slavery in the territories, since such prohibition would deprive masters of their slave property without the due process guaranteed them by the Constitution.

With the acquisition of territory that resulted from the Spanish-American War, new problems and difficulties arose in the government of these possessions. Several cases came to the Supreme Court, involving again the power of Congress and the application of the Constitution. These are collectively known as the Insular Cases, the most important of which are probably *Downes v. Bidwell* and *Dorr v. United States*.<sup>1</sup> The first of these involved the power to impose duties upon goods imported from Porto Rico, and the second the right to deny jury trial in the Philippines. The Supreme Court, in divided decisions, met these new situations with two novel and interesting doctrines, viz. the classification of territory into incorporated and unincorporated, and the division of the Constitution into formal and fundamental parts. The Court then applied these doctrines in such a way as to uphold the power of Congress in each case.

## a. Doctrine of Incorporated and Unincorporated Territory

[*Downes v. Bidwell* (1901), 182 U. S. 244, 280-287, 338-342, 386-391; 45 L. Ed. 1088, 1103-1106, 1126-1127, 1144-1146.]

Mr. Justice Brown announced the conclusion and judgment of the court: . . .

We are also of opinion that the power to acquire territory by treaty implies, not only the power to govern such territory, but to prescribe upon what terms the United States will receive its inhabitants, and what their status shall be in what Chief Justice Marshall termed the "American empire." There seems to be no middle ground between this position and the doctrine that if their inhabitants do not become, immediately upon annexation, citizens of the United States, their children thereafter born, whether savages or civilized, are such, and entitled to all the rights, privileges, and immunities of citizens. If such be their status, the consequences will be extremely serious. Indeed, it is doubtful if Congress would ever assent to the annexation of territory upon the condition that

<sup>1</sup> The other principal cases in this group are: *DeLima v. Bidwell* (1901), 182 U. S. 1; *Dooley v. United States* (1901), 182 U. S. 222; *Dooley v. United States* (1901), 183 U. S. 151; *Fourteen Diamond Rings* (1901), 183 U. S. 176; *Hawaii v. Mankichi* (1903), 190 U. S. 197.



its inhabitants, however foreign they may be to our habits, traditions, and modes of life, shall become at once citizens of the United States.

...

It is obvious that in the annexation of outlying and distant possessions grave questions will arise from differences of race, habits, laws, and customs of the people, and from differences of soil, climate, and production, which may require action on the part of Congress that would be quite unnecessary in the annexation of contiguous territory inhabited only by people of the same race, or by scattered bodies of native Indians.

We suggest, without intending to decide, that there may be a distinction between certain natural rights enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them, or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law, and to an equal protection of the laws; to immunities from unreasonable searches and seizures, as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett*, 21 Wall. 162, 22 L. ed. 627), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the states to be unnecessary to the proper protection of individuals.

Whatever may be finally decided by the American people as to the status of these islands and their inhabitants,—whether they shall be introduced into the sisterhood of states or be permitted to form independent governments,—it does not follow that in the meantime, awaiting that decision, the people are in the matter of personal rights unprotected by the provisions of our Constitution and subject to the merely arbitrary control of Congress. Even if regarded as aliens, they are entitled under the principles of the Constitution to be protected in life, liberty, and property. This has been frequently held by this court in respect to the Chinese, even when aliens, not possessed of the political rights of citizens of the United States. . . .

We do not desire, however, to anticipate the difficulties which would naturally arise in this connection, but merely to disclaim any intention to hold that the inhabitants of these territories are subject to an unre-



strained power on the part of Congress to deal with them upon the theory that they have no rights which it is bound to respect. . . .

Patriotic and intelligent men may differ widely as to the desirableness of this or that acquisition, but this is solely a political question. We can only consider this aspect of the case so far as to say that no construction of the Constitution should be adopted which would prevent Congress from considering each case upon its merits, unless the language of the instrument imperatively demand it. A false step at this time might be fatal to the development of what Chief Justice Marshall called the American empire. Choice in some cases, the natural gravitation of small bodies towards large ones in others, the result of a successful war in still others, may bring about conditions which would render the annexation of distant possessions desirable. If those possessions are inhabited by alien races, differing from us in religion, customs, laws, methods of taxation, and modes of thought, the administration of government and justice, according to Anglo-Saxon principles, may for a time be impossible; and the question at once arises whether large concessions ought not to be made for a time, that ultimately our own theories may be carried out, and the blessings of a free government under the Constitution extended to them. We decline to hold that there is anything in the Constitution to forbid such action.

We are therefore of opinion that the island of Porto Rico is a territory apurtenant and belonging to the United States, but not a part of the United States within the revenue clauses of the Constitution; that the Foraker act is constitutional, so far as it imposes duties upon imports from such island, and that the plaintiff cannot recover back the duties exacted in this case.

*The judgment of the Circuit Court is therefore affirmed.*

Mr. Justice White, with whom concurred Mr. Justice Shiras and Mr. Justice McKenna, uniting in the judgment of affirmance:

Mr. Justice Brown, in announcing the judgment of affirmance, has in his opinion stated his reasons for his concurrence in such judgment. In the result I likewise concur. As, however, the reasons which cause me to do so are different from, if not in conflict with, those expressed in that opinion, if its meaning is by me not misconceived, it becomes my duty to state the convictions which control me. . . .

It is, then, as I think, indubitably settled by the principles of the law of nations, by the nature of the government created under the Constitution, by the express and implied powers conferred upon that government by the Constitution, by the mode in which those powers have been

executed from the beginning, and by an unbroken line of decisions of this court, first announced by Marshall and followed and lucidly expounded by Taney, that the treaty-making power cannot incorporate territory into the United States without the express or implied assent of Congress, that it may insert in a treaty conditions against immediate incorporation, and that on the other hand, when it has expressed in the treaty the conditions favorable to incorporation they will, if the treaty be not repudiated by Congress, have the force of the law of the land, and therefore by the fulfillment of such conditions cause incorporation to result. It must follow, therefore, that where a treaty contains no conditions for incorporation, and, above all, where it not only has no such conditions, but expressly provides to the contrary, that incorporation does not arise until in the wisdom of Congress it is deemed that the acquired territory has reached that state where it is proper that it should enter into and form a part of the American family. . . .

The result of what has been said [about the treaty with respect to Porto Rico] is that while in an international sense Porto Rico was not a foreign country, since it was subject to the sovereignty of and was owned by the United States, it was foreign to the United States in a domestic sense, because the island had not been incorporated into the United States, but was merely *apartenant* thereto as a possession. As a necessary consequence, the impost in question assessed on merchandise coming from Porto Rico into the United States after the cession was within the power of Congress, and that body was not, moreover, as to such impost, controlled by the clause requiring that imposts should be uniform throughout the United States; in other words, the provision of the Constitution just referred to was not applicable to Congress in legislating for Porto Rico. . . .

[Justice Gray filed a separate concurring opinion.]

Mr. Justice Harlan, dissenting: . . .

I reject altogether the theory that Congress, in its discretion, can exclude the Constitution from a domestic territory of the United States, acquired, and which could only have been acquired, in virtue of the Constitution. I cannot agree that it is a domestic territory of the United States for the purpose of preventing the application of the tariff act imposing duties upon imports from foreign countries, but not a part of the United States for the purpose of enforcing the constitutional requirement that *all* duties, imposts, and excises imposed by Congress "shall be uniform throughout the United States." How Porto Rico can be a domestic territory of the United States, as distinctly held in

*De Lima v. Bidwell*, and yet, as is now held, not embraced by the words "throughout the United States," is more than I can understand. . . .

It would seem, according to the theories of some, that even if Porto Rico is in and of the United States for many important purposes, it is yet not a part of this country with the privilege of protesting against a rule of taxation which Congress is expressly forbidden by the Constitution from adopting as to any part of the "United States." And this result comes from the failure of Congress to use the word "incorporate" in the Foraker act, although by the same act all power exercised by the civil government in Porto Rico is by authority of the United States, and although this court has been given jurisdiction by writ of error or appeal to re-examine the final judgments of the district court of the United States established by Congress for that territory. Suppose Congress had passed this act: "*Be it enacted by the Senate and House of Representatives in Congress assembled, That Porto Rico be and is hereby incorporated into the United States as a territory,*" would such a statute have enlarged the scope or effect of the Foraker act? Would such a statute have accomplished more than the Foraker act has done? Indeed, would not such legislation have been regarded as most extraordinary as well as unnecessary?

I am constrained to say that this idea of "incorporation" has some occult meaning which my mind does not apprehend. It is enveloped in some mystery which I am unable to unravel.

In my opinion Porto Rico became, at least after the ratification of the treaty with Spain, a part of and subject to the jurisdiction of the United States in respect of all its territory and people, and that Congress could not thereafter impose any duty, impost, or excise with respect to that island and its inhabitants which departed from the rule of uniformity established by the Constitution.

#### **b. Doctrine of Formal and Fundamental Constitutional Provisions**

[*Dorr v. United States* (1904), 195 U. S. 138, 142-156; 49 L. Ed. 128, 130-135.]

Mr. Justice Day delivered the opinion of the court:

The case presents the question whether, in the absence of a statute of Congress expressly conferring the right, trial by jury is a necessary incident of judicial procedure in the Philippine Islands, where demand for trial by that method has been made by the accused, and denied by the courts established in the islands. . . .

In every case where Congress undertakes to legislate in the exercise of the power conferred by the Constitution, the question may arise as to how far the exercise of the power is limited by the "prohibitions" of that instrument. The limitations which are to be applied in any given case involving territorial government must depend upon the relation of the particular territory to the United States, concerning which Congress is exercising the power conferred by the Constitution. That the United States may have territory which is not incorporated into the United States as a body politic, we think was recognized by the framers of the Constitution in enacting the article already considered, giving power over the territories, and is sanctioned by the opinions of the justices concurring in the judgment in *Downes v. Bidwell*, 182 U. S. 244-288, 45 L. ed. 1088-1106, 21 Sup. Ct. Rep. 770.

Until Congress shall see fit to incorporate territory ceded by treaty into the United States, we regard it as settled by that decision that the territory is to be governed under the power existing in Congress to make laws for such territories, and subject to such constitutional restrictions upon the powers of that body as are applicable to the situation.

For this case the practical question is, Must Congress, in establishing a system for the Philippine Islands, carry to their people by proper affirmative legislation a system of trial by jury?

If the treaty-making power could incorporate territory into the United States without congressional action, it is apparent that the treaty with Spain, ceding the Philippines to the United States [30 Stat. at L. 1759], carefully refrained from so doing; for it is expressly provided that (article 9): "The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress." In this language it is clear that it was the intention of the framers of the treaty to reserve to Congress, so far as it could be constitutionally done, a free hand in dealing with these newly-acquired possessions.

The legislation upon the subject shows that not only has Congress hitherto refrained from incorporating the Philippines into the United States, but in the act of 1902, providing for temporary civil government (32 Stat. at L. 69, chap. 1369), there is express provision that § 1891 of the Revised Statutes of 1878 shall not apply to the Philippine Islands. This is the section giving force and effect to the Constitution and laws of the United States, not locally inapplicable, within all the organized territories, and every territory thereafter organized, as elsewhere within the United States. . . .



It was said in the *Mankichi Case*, 190 U. S. 197, 47 L. ed. 1016, 23 Sup. Ct. Rep. 787, that when the territory had not been incorporated into the United States these requirements were not limitations upon the power of Congress in providing a government for territory in execution of the powers conferred upon Congress. . . .

In the same case Mr. Justice Brown, in the course of his opinion, said: "We would even go farther, and say that most, if not all, the privileges and immunities contained in the Bill of Rights of the Constitution were intended to apply from the moment of annexation; but we place our decision of this case upon the ground that the two rights alleged to be violated in this case [right to trial by jury and presentment by grand jury] are not fundamental in their nature, but concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property, and their well being."

As we have had occasion to see in the case of *Kepner v. United States*, 195 U. S. 100, *ante*, 114, 24 Sup. Ct. Rep. 797, the President, in his instructions to the Philippine Commission, while impressing the necessity of carrying into the new government the guaranties of the Bill of Rights securing those safeguards to life and liberty which are deemed essential to our government, was careful to reserve the right to trial by jury, which was doubtless due to the fact that the civilized portion of the islands had a system of jurisprudence founded upon the civil law, and the uncivilized parts of the archipelago were wholly unfitted to exercise the right of trial by jury. The Spanish system, in force in the Philippines, gave the right to the accused to be tried before judges, who acted in effect as a court of inquiry, and whose judgments were not final until passed in review before the *audiencia*, or superior court, with right of final review, and power to grant a new trial for errors of law, in the supreme court at Madrid. To this system the Philippine Commission, in executing the power conferred by the orders of the President, and sanctioned by act of Congress (act of July 1, 1902, 32 Stat. at L. 691, chap. 1369), has added a guaranty of the right of the accused to be heard by himself and counsel, to demand the nature and cause of the accusation against him, to have a speedy and public trial, to meet the witnesses against him face to face, and to have compulsory process to compel the attendance of witnesses in his behalf. And, further, that no person shall be held to answer for a criminal offense without due process of law, nor be put twice in jeopardy of punishment for the same offense, nor be compelled in any criminal case to be a witness against himself. As appears in the *Kepner Case*, 195 U. S. 100, *ante*, 114, 24 Supt. Ct. Rep.

797, the accused is given the right of appeal from the judgment of the court of first instance to the supreme court, and, in capital cases, the case goes to the latter court without appeal. It cannot be successfully maintained that this system does not give an adequate and efficient method of protecting the rights of the accused as well as executing the criminal law by judicial proceedings which give full opportunity to be heard by competent tribunals before judgment can be pronounced. Of course, it is a complete answer to this suggestion to say, if such be the fact, that the constitutional requirements as to a jury trial, either of their own force or as limitations upon the power of Congress in setting up a government, must control in all the territory, whether incorporated or not, of the United States. But is this a reasonable interpretation of the power conferred upon Congress to make rules and regulations for the territories? . . .

If the right to trial by jury were a fundamental right which goes wherever the jurisdiction of the United States extends, or if Congress, in framing laws for outlying territory belonging to the United States, was obliged to establish that system by affirmative legislation, it would follow that, no matter what the needs or capacities of the people, trial by jury, and in no other way, must be forthwith established, although the result may be to work injustice and provoke disturbance rather than to aid the orderly administration of justice. If the United States, impelled by its duty or advantage, shall acquire territory peopled by savages, and of which it may dispose or not hold for ultimate admission to statehood, if this doctrine is sound, it must establish there the trial by jury. To state such a proposition demonstrates the impossibility of carrying it into practice. Again, if the United States shall acquire by treaty the cession of territory having an established system of jurisprudence, where jury trials are unknown, but a method of fair and orderly trial prevails under an acceptable and long-established code, the preference of the people must be disregarded, their established customs ignored, and they themselves coerced to accept, in advance of incorporation into the United States, a system of trial unknown to them and unsuited to their needs. We do not think it was intended, in giving power to Congress to make regulations for the territories, to hamper its exercise with this condition.

We conclude that the power to govern territory, implied in the right to acquire it, and given to Congress in the Constitution in article 4, § 3, to whatever other limitations it may be subject, the extent of which must be decided as questions arise does not require that body to enact for ceded territory, not made a part of the United States by congressional action, a system of laws which shall include the right of trial by jury,



and that the Constitution does not, without legislation, and of its own force, carry such right to territory so situated. . . .

[Chief Justice Fuller and Justices Peckham and Brewer filed a concurring opinion, declaring that while they did not themselves believe in the doctrine here stated, they concurred in it because they felt bound by previously decided cases.]

Mr. Justice Harlan, dissenting :

I do not believe now any more than I did when *Hawaii v. Mankichi*, 190 U. S. 197, 47 L. ed 1016, 23 Sup. Ct. Rep. 787, was decided, that the provisions of the Federal Constitution as to grand and petit juries relate to mere methods of procedure, and are not fundamental in their nature. In my opinion, guaranties for the protection of life, liberty, and property, as embodied in the Constitution, are for the benefit of all, of whatever race or nativity, in the states composing the Union, or in any territory, however acquired, over the inhabitants of which the government of the United States may exercise the powers conferred upon it by the Constitution.

The Constitution declares that *no* person, except in the land or naval forces, shall be held to answer for a capital or otherwise infamous crime, except on the presentment or indictment of a grand jury; and forbids the conviction, in a criminal prosecution, of any person, for any crime, except on the unanimous verdict of a petit jury composed of twelve persons. Necessarily, that mandate was addressed to every one committing crime punishable by the United States. This court, however, holds that these provisions are not fundamental, and may be disregarded in any territory acquired in the manner the Philippine Islands were acquired, although, as heretofore decided by this court, they could not be disregarded in what are commonly called the organized territories of the United States. *Thompson v. Utah*, 170 U. S. 343, 32 L. ed. 1061, 18 Sup. Ct. Rep. 620. I cannot assent to this interpretation of the Constitution. It is, I submit, so obviously inconsistent with the Constitution that I cannot regard the judgment of the court otherwise than as an amendment of that instrument by judicial construction, when a different mode of amendment is expressly provided for. Grand juries and petit juries may be, at times, somewhat inconvenient in the administration of criminal justice in the Philippines. But such inconveniences are of slight consequence compared with the dangers to our system of government arising from judicial amendments of the Constitution. The Constitution declares that it "shall be the supreme law of the land." But the court in effect adjudges that the Philippine Islands are not part of

the "land," within the meaning of the Constitution, although they are governed by the sovereign authority of the United States, and although their inhabitants are subject in all respects to its jurisdiction,—as much so as are the people in the District of Columbia or in the several states of the Union. No power exists in the judiciary to suspend the operation of the Constitution in any territory governed, as to its affairs and people, by authority of the United States. As a Filipino committing the crime of murder in the Philippine Islands may be hung by the sovereign authority of the United States, and as the Philippine Islands are under a civil, not military, government, the suggestion that he may not, of right, appeal for his protection to the jury provisions of the Constitution, which constitutes the only source of the power that the government may exercise at any time or at any place, is utterly revolting to my mind, and can never receive my sanction. . . .

## 112. DISTRICT OF COLUMBIA

During the period of the Confederation, and while sitting at Philadelphia, Congress was at one time nearly mobbed by groups of dissatisfied soldiers. This and other occurrences emphasized the necessity of locating the seat of the federal government within a region completely subject to the control of that government. Upon the adoption of the new Constitution, the states of Maryland and Virginia ceded to the United States a tract of land approximately ten miles square, lying on both sides of the Potomac River, and since known as the District of Columbia. In 1846 the portion lying on the Virginia side was ceded to that state, the District consisting therefore of approximately 70 square miles, including within it the city of Washington and the surrounding suburban areas. Under its power of exclusive legislation for this region Congress has established different forms of government at various times. From 1790 until 1802, there was a board of three commissioners appointed by the President. In 1802 a mayor-council form of government was provided, with an elective council, and a mayor at first appointed by the President, later (1812) made elective by the council, and in 1820 elective by the people. In 1871, the charters of Washington and of the older city of Georgetown were both revoked, and the District of Columbia made a single governmental unit; its government consisted of a governor and other officers appointed by the President, a bicameral legislative assembly elected by the people, and a delegate in Congress also popularly elected. In 1874, this territorial form of government was abolished, and a temporary government was established, consisting of three commissioners appointed by the President. In 1878 this temporary form was, in effect, made permanent by the so-called Organic Act of that year.

The residents of the District have made frequent protests against their lack of representation or participation in the government, and numerous proposals have been made from time to time to change the system in that respect. During recent years these proposals have been more seriously pressed, and it is probable that eventually the District may be given a somewhat more popular and democratic form of government.

## a. Organic Act of 1878

[*U. S. Statutes*, vol. 20, pp. 102-108.]

An act providing a permanent form of government for the District of Columbia.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That all the territory which was ceded by the State of Maryland to the Congress of the United States for the permanent seat of the government of the United States shall continue to be designated as the District of Columbia. Said District and the property and persons that may be therein shall be subject to the following provisions for the government of the same, and also to any existing laws applicable thereto not hereby repealed or inconsistent with the provisions of this act. The District of Columbia shall remain and continue a municipal corporation, as provided in section two of the Revised Statutes relating to said District, and the Commissioners herein provided for shall be deemed and taken as officers of such corporation; and all laws now in force relating to the District of Columbia not inconsistent with the provisions of this act shall remain in full force and effect.

SEC. 2. That within twenty days after the approval of this act the President of the United States, by and with the advice and consent of the Senate, is hereby authorized to appoint two persons, who, with an officer of the Corps of Engineers of the United States Army, whose lineal rank shall be above that of captain, shall be Commissioners of the District of Columbia, and who, from and after July first, eighteen hundred and seventy-eight, shall exercise all the powers and authority now vested in the Commissioners of said District, except as are hereinafter limited or provided, and shall be subject to all restrictions and limitations and duties which are now imposed upon said Commissioners. The Commissioner who shall be an officer detailed, from time to time, from the Corps of Engineers, by the President, for this duty, shall not be required to perform any other, nor shall he receive any other compensation than his regular pay and allowances as an officer of the Army. The two persons appointed from civil life shall, at the time of their appointment, be citizens of the District of Columbia for three years next before their appointment, and have, during that period, claimed residence nowhere else, and one of said three Commissioners shall be chosen president of the Board of Commissioners at their first meeting, and annually and whenever a vacancy shall occur, thereafter. . . .

SEC. 3. That as soon as the Commissioners appointed and detailed as aforesaid shall have taken and subscribed the oath or affirmation hereinbefore required, all the powers, rights, duties, and privileges lawfully exercised by, and all property, estate, and effects now vested by law in the Commissioners appointed under the provisions of the act of Congress approved June twentieth, eighteen hundred and seventy-four, shall cease and determine [*sic*]. And the Commissioners of the District of Columbia shall have power, subject to the limitations and provisions herein contained, to apply the taxes or other revenues of said District to the payment of the current expenses thereof, to the support of the public schools, the fire department, and the police, and for that purpose shall take possession and supervision of all the offices, books, papers, records, moneys, credits, securities, assets, and accounts belonging or appertaining to the business or interests of the government of the District of Columbia, and exercise the duties, powers, and authority aforesaid; but said Commissioners, in the exercise of such duties, powers, and authority, shall make no contract, nor incur any obligation other than such contracts and obligations as are hereinafter provided for and shall be approved by Congress. . . . And said Commissioners are hereby authorized to abolish any office, to consolidate two or more offices, reduce the number of employees, remove from office, and make appointments to any office under them authorized by law. . . . The said Commissioners shall submit to the Secretary of the Treasury for the fiscal year ending June thirtieth, eighteen hundred and seventy-nine, and annually thereafter, for his examination and approval, a statement showing in detail the work proposed to be undertaken by them during the fiscal year next ensuing, and the estimated cost thereof; also the cost of constructing, repairing, and maintaining all bridges authorized by law across the Potomac River within the District of Columbia, and also all other streams in said District; the cost of maintaining all public institutions of charity, reformatories, and prisons belonging to or controlled wholly or in part by the District of Columbia, and which are now by law supported wholly or in part by the United States or District of Columbia; and also the expenses of the Washington Aqueduct and its appurtenances; and also an itemized statement and estimate of the amount necessary to defray the expenses of the government of the District of Columbia for the next fiscal year. . . . To the extent to which Congress shall approve of said estimates, Congress shall appropriate the amount of fifty per centum thereof; and the remaining fifty per centum of such approved estimates shall be levied and assessed upon the taxable property and privileges in said District



other than the property of the United States and of the District of Columbia. . . .

SEC. 12. That it shall be the duty of the said Commissioners to report to Congress at the next session succeeding their appointment a draft of such additional laws or amendments to existing laws as in their opinion are necessary for the harmonious working of the system hereby adopted, and for the effectual and proper government of the District of Columbia; and said Commissioners shall annually report their official doings in detail to Congress on or before the first Monday of December.

. . .

Approved, June 11, 1878.

### **b. Capper Proposal**

[Remarks of Sen. Capper (Kans.) in Senate, May 25, 1934. *Congressional Record*, vol. 78, pt. 9, pp. 9586-9587.]

#### **RIGHT OF SUFFRAGE FOR CITIZENS OF DISTRICT OF COLUMBIA**

MR. CAPPER. Mr. President, I had cherished the hope at the beginning of the Seventy-third Congress that opportunity would be afforded for consideration and action upon a matter of major importance to the people of the District of Columbia. However, the pressure of urgent national legislation has prevented.

The question to which I refer is embodied in Senate Joint Resolution 9, which it was my privilege to introduce early in the first session of the present Congress. This resolution proposes an amendment to the Constitution of the United States, empowering Congress to grant unto the residents of the District of Columbia voting representation in the Senate, the House of Representatives, and the electoral college and the same rights in respect to access to the courts of the United States as possessed by citizens of a State.

Mr. President, there is no matter affecting the National Capital community which is of as vital importance to the half million inhabitants of the District of Columbia as this proposal, whether viewed from either a local or a national angle. Here at the very heart of our great Republic we have a most anomalous condition—a great intelligent community of patriotic Americans deprived of all representation and participation in their Government, both local and National, though privileged to bear the burdens of taxation and all other obligations of citizenship. It has always seemed to me to be the very height of inconsistency for Congress, representing the world's great representative Republic, to maintain at the

seat of government, under its exclusive control, such a glaring violation of the theory of republican government.

The District of Columbia, according to the 1930 United States census, has a population of 486,869, which is greater than that of eight of the sovereign States of the Union—New Hampshire, Idaho, Arizona, New Mexico, Vermont, Delaware, Wyoming, and Nevada. The District's population exceeds that of Delaware and Wyoming combined, Delaware and Nevada combined, Wyoming and Nevada combined, and Vermont and Nevada combined. Each of these combinations is represented in the Senate by 4 Senators and in the House of Representatives by 2 Representatives, while the District of Columbia has no representation in either body.

With a population of persons of voting age of 341,465, the District exceeds the population of voting age of 10 of the States. The good people of our country do not understand these facts regarding the District of Columbia or that these unrepresented Americans bear all of the burdens which are borne by all other national Americans.

The people of the District of Columbia pay both local and national taxes just as do the people in the States. For the fiscal year 1933 the District residents paid in Federal income and miscellaneous internal-revenue taxes an amount greater than that paid by each of 25 of the States and more than the combined payments of 10 States.

Mr. President, among many erroneous impressions regarding the District of Columbia is the idea that most of the residents here are Government employees and hold a voting residence back in the States. Nothing is further from the truth. In the first place, those engaged in gainful employment outside the Government far exceed in number the Federal employees, and, secondly, the number possessing and exercising the voting privilege is comparatively small. During the 1930 census enumeration a special questionnaire was used to ascertain just what this local voting strength was. The result reported by the Census Bureau is that there were found 15,105 in the District having a voting residence in the States which they had recently exercised. While the accuracy or adequacy of these figures has been challenged by the local political groups, the most extravagant and unreasonable claims cannot raise the number with power to vote in the States above 80,000. If from the population of voting age in the States and the District is first deducted the number of unnaturalized foreigners and there be a further deduction in the case of the District, the extravagant estimate of 80,000, the District is still found to possess a potential voting strength of 251,439, which is greater than that of each of 10 States.



Whether measured by the standard of population, payment of national taxes, service in war or peace, or the bearing of any national burdens, the District is to be found shoulder to shoulder with the States of the Union, and in per capita measurement is among the leaders. This showing is one clearly indicating that in every respect these people are as justly entitled to the full rights and privileges of representative government as any people under the Stars and Stripes.

The Congress seems to have considerable difficulty in legislating for this smallest in area of our American community subdivisions, and I believe this is largely due to the un-American conditions which prevail here contrary to the fundamental principles of our Government. There has been considerable discussion of plans for reorganizing the local government of the District of Columbia and the changing of its form, but these are matters for future consideration and there seem to be the widest differences of opinion as to the lines such reforms shall take.

Based upon sound fundamental American principles, there seems to be no room for a difference of opinion as to the necessity as well as the absolute justice of granting the right of voting representation to these, our fellow Americans, in the National Government which legislates for them, both locally and nationally, which taxes them and sends them to war.

Mr. President, in 1922 the Senate Committee on the District of Columbia submitted to the Senate in the Sixty-seventh Congress a very comprehensive favorable report upon this proposal. I ask unanimous consent to print in the RECORD a summary of the conclusions reached by that committee.

There being no objection, the summary was ordered to be printed in the RECORD, as follows:

#### SUMMARY

Summarizing, we find and report:

The proposed constitutional amendment does not reduce the power of Congress in respect to the Capital but adds a new power; it does not propose the admission of the District into the Union as a sovereign State; it does not propose the destruction of the "10 miles square" provision of the Constitution; it does not lessen in the smallest degree the control by the Nation through Congress of what remains of the "10 miles square"; it does not disturb in any way the financial relation of Nation and Capital; it is not based upon either the abolition or retention of the half-and-half law; it does not propose or involve changes in the municipal government of the District.

It plans to bestow upon the 437,000 [now nearly 500,000] Americans of the District a distinctive basic right of the American citizen—in a

government of the people, by the people, for the people—in a government which roots its justice in consent of the governed—in a representative government which inseparably couples taxation and arms bearing as a soldier with representation.

This distinctive American privilege decorates the American with a badge of honor and arms him with power. Its lack slurs the Washingtonian as unfit and defective, and slurs the Nation as in this respect un-American and impotent.

What the amendment proposes is equitable in itself and compulsory in accordance with American principles and traditions.

It gives to residents of the District rights and privileges which, under our scheme of government, belong to all who pay national taxes and fight as national soldiers.

It gives to residents of the District a self-protecting power in the national councils which is denied to the resident of no other community in all of the mainland and contiguous United States from Maine to Texas and from New York to California.

In the matter of access to the Federal courts, it raises District residents from a lower plane than that of aliens to the status of citizens of a State.

National representation of the District will remove from the Nation the shame of impotency.

It will proclaim to the world that the great Republic is as devoted to the principles of representative government and as capable of enforcing them as other republics with capitals in nation-controlled districts, like Mexico, Brazil, and Argentina. These nations have not found themselves impotent to give full national representation to the people of their capitals.

It will proclaim to the world that the people of Washington are as fit to participate in national representative government as the people of Rio de Janeiro, Buenos Aires, and Mexico City. Washington will cease to be the only capital in all the world whose people, slurred as tainted or defective, are unworthy to enjoy the same national representation as that enjoyed by all other cities of the Nation.

Washington will cease to be the only American community—numerous, intelligent, prosperous, public spirited, and patriotic—in all the expanse of continental and contiguous United States whose fitness to exercise national privileges as well as to bear national burdens is denied.

National representation will clothe the Washingtonian with a vital American privilege to which he is undeniably in equity entitled; will cleanse him of the stigma and stain of un-Americanism; and, curing his political impotency, will arm him with a certain power.

It will relieve the Nation of the shame of un-Americanism at its heart and of impotency to cure this evil.

It will inflict no injury or hardship upon either Nation or Capital to counteract these benefits.

Mr. CAPPER. Mr. President, it will be my purpose to reintroduce this joint resolution in the Seventy-fourth Congress and to urge favorable consideration and action thereon.

## 113. STATUS OF THE PHILIPPINES

When the Philippine Islands were acquired in 1898, their exact status in the constitutional system of the United States was undetermined, although it was generally presumed that they would be held only temporarily. The Filipinos themselves desired immediate independence, but this was denied them. They were, however, given official assurances from time to time that independence would be accorded as soon as a stable government had been established, the so-called Jones Act of 1916 incorporating that assurance into a statute that gave them also practically complete self-government. President Wilson, at the close of his term, recommended to Congress the fulfillment of these pledges, holding that the conditions laid down had been met. This recommendation was not acted upon by Congress, and special missions sent by Presidents Harding and Coolidge to investigate conditions in the Philippines (the Wood-Forbes and Carmi Thompson missions, respectively) reported the time not yet ripe for independence. President Harding supported this view in replying to a strong plea for independence made by a special Philippine Parliamentary Mission in 1922, as did also President Coolidge in replying to a similar mission in 1924. However, in January, 1933, Congress passed, over the veto of President Hoover, the Hare-Hawes-Cutting Act giving provisional independence to the Philippines, but this act was rejected by the Philippine Legislature because of certain unsatisfactory provisions with respect to trade relations, immigration, and military and naval reservations. Thereupon Congress passed a slightly modified act (the Tydings-McDuffie Act), which was approved by President Roosevelt on March 24, 1934, and under which the Commonwealth of the Philippines was formally inaugurated on November 15, 1935.

## a. Philippine Independence Act

[Passed House Mar. 19, 1934, without record vote; passed Senate Mar. 22, by vote of 68-8. *U. S. Statutes*, vol. 48, pt. 1, pp. 456-465.]

## AN ACT

To provide for the complete independence of the Philippine Islands, to provide for the adoption of a constitution and a form of government for the Philippine Islands, and for other purposes

*Be it enacted by the Senate and House of Representatives of the United States in Congress assembled,*

## CONVENTION TO FRAME CONSTITUTION FOR PHILIPPINE ISLANDS

SECTION 1. The Philippine Legislature is hereby authorized to provide for the election of delegates to a constitutional convention, which shall meet in the hall of the house of representatives in the capital of the Philippine Islands, at such time as the Philippine Legislature may fix, but not later than October 1, 1934, to formulate and draft a constitution for the government of the Commonwealth of the Philippine Islands, subject to the conditions and qualifications prescribed in this act, which

shall exercise jurisdiction over all the territory ceded to the United States by the treaty of peace concluded between the United States and Spain on the 10th day of December 1898, the boundaries of which are set forth in article III of said treaty, together with those islands embraced in the treaty between Spain and the United States concluded at Washington on the 7th day of November 1900. The Philippine Legislature shall provide for the necessary expenses of such convention.

#### CHARACTER OF CONSTITUTION—MANDATORY PROVISIONS

SEC. 2. (a) The constitution formulated and drafted shall be republican in form, shall contain a bill of rights, and shall, either as a part thereof or in an ordinance appended thereto, contain provisions to the effect that, pending the final and complete withdrawal of the sovereignty of the United States over the Philippine Islands—

(1) All citizens of the Philippine Islands shall owe allegiance to the United States.

(2) Every officer of the government of the Commonwealth of the Philippine Islands shall, before entering upon the discharge of his duties, take and subscribe an oath of office, declaring, among other things, that he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States.

(3) Absolute toleration of religious sentiment shall be secured, and no inhabitant or religious organization shall be molested in person or property on account of religious belief or mode of worship.

(4) Property owned by the United States, cemeteries, churches, and parsonages or convents apurtenant thereto, and all lands, buildings, and improvements used exclusively for religious, charitable, or educational purposes shall be exempt from taxation.

(5) Trade relations between the Philippine Islands and the United States shall be upon the basis prescribed in section 6.

(6) The public debt of the Philippine Islands and its subordinate branches shall not exceed limits now or hereafter fixed by the Congress of the United States; and no loans shall be contracted in foreign countries without the approval of the President of the United States.

(7) The debts, liabilities, and obligations of the present Philippine government, its Provinces, municipalities, and instrumentalities, valid and subsisting at the time of the adoption of the constitution, shall be assumed and paid by the new government.

(8) Provision shall be made for the establishment and maintenance of an adequate system of public schools, primarily conducted in the English language.

(9) Acts affecting currency, coinage, imports, exports, and immigration shall not become law until approved by the President of the United States.

(10) Foreign affairs shall be under the direct supervision and control of the United States.

(11) All acts passed by the Legislature of the Commonwealth of the Philippine Islands shall be reported to the Congress of the United States.

(12) The Philippine Islands recognizes the right of the United States to expropriate property for public uses, to maintain military and other reservations and armed forces in the Philippines, and, upon order of the President, to call into the service of such armed forces all military forces organized by the Philippine government.

(13) The decisions of the courts of the Commonwealth of the Philippine Islands shall be subject to review by the Supreme Court of the United States as provided in paragraph (6) of section 7.

(14) The United States may, by Presidential proclamation, exercise the right to intervene for the preservation of the government of the Commonwealth of the Philippine Islands and for the maintenance of the government as provided in the constitution thereof, and for the protection of life, property, and individual liberty, and for the discharge of government obligations under and in accordance with the provisions of the constitution.

(15) The authority of the United States High Commissioner to the government of the Commonwealth of the Philippine Islands, as provided in this act, shall be recognized.

(16) Citizens and corporations of the United States shall enjoy in the Commonwealth of the Philippine Islands all the civil rights of the citizens and corporations, respectively, thereof.

(b) The constitution shall also contain the following provisions, effective as of the date of the proclamation of the President recognizing the independence of the Philippine Islands, as hereinafter provided:

(1) That the property rights of the United States and the Philippine Islands shall be promptly adjusted and settled, and that all existing property rights of citizens or corporations of the United States shall be acknowledged, respected, and safeguarded to the same extent as property rights of citizens of the Philippine Islands.

(2) That the officials elected and serving under the constitution adopted pursuant to the provisions of this act shall be constitutional officers of the free and independent government of the Philippine Islands and qualified to function in all respects as if elected directly under such



government, and shall serve their full terms of office as prescribed in the constitution.

(3) That the debts and liabilities of the Philippine Islands, its Provinces, cities, municipalities, and instrumentalities, which shall be valid and subsisting at the time of the final and complete withdrawal of the sovereignty of the United States, shall be assumed by the free and independent government of the Philippine Islands; and that where bonds have been issued under authority of an act of Congress of the United States by the Philippine Islands, or any Province, city, or municipality therein, the Philippine government will make adequate provision for the necessary funds for the payment of interest and principal, and such obligations shall be a first lien on the taxes collected in the Philippine Islands.

(4) That the government of the Philippine Islands, on becoming independent of the United States, will assume all continuing obligations assumed by the United States under the treaty of peace with Spain ceding said Philippine Islands to the United States.

(5) That by way of further assurance the government of the Philippine Islands will embody the foregoing provisions (except par. (2)) in a treaty with the United States.

#### SUBMISSION OF CONSTITUTION TO THE PRESIDENT OF THE UNITED STATES

SEC. 3. Upon the drafting and approval of the constitution by the constitutional convention in the Philippine Islands, the constitution shall be submitted within 2 years after the enactment of this act to the President of the United States, who shall determine whether or not it conforms with the provisions of this act. If the President finds that the proposed constitution conforms substantially with the provisions of this act, he shall so certify to the Governor General of the Philippine Islands, who shall so advise the constitutional convention. If the President finds that the constitution does not conform with the provisions of this act, he shall so advise the Governor General of the Philippine Islands, stating wherein in his judgment the constitution does not so conform and submitting provisions which will in his judgment make the constitution so conform. The Governor General shall in turn submit such message to the constitutional convention for further action by them pursuant to the same procedure hereinbefore defined, until the President and the constitutional convention are in agreement.



## SUBMISSION OF CONSTITUTION TO FILIPINO PEOPLE

SEC. 4. After the President of the United States has certified that the constitution conforms with the provisions of this act, it shall be submitted to the people of the Philippine Islands for their ratification or rejection at an election to be held within 4 months after the date of such certification, on a date to be fixed by the Philippine Legislature, at which election the qualified voters of the Philippine Islands shall have an opportunity to vote directly for or against the proposed constitution and ordinances appended thereto. Such election shall be held in such manner as may be prescribed by the Philippine Legislature, to which the return of the election shall be made. The Philippine Legislature shall by law provide for the canvassing of the return and shall certify the result to the Governor General of the Philippine Islands, together with a statement of the votes cast and a copy of said constitution and ordinances. If a majority of the votes cast shall be for the constitution, such vote shall be deemed an expression of the will of the people of the Philippine Islands in favor of Philippine independence, and the Governor General shall, within 30 days after receipt of the certification from the Philippine Legislature, issue a proclamation for the election of officers of the government of the Commonwealth of the Philippine Islands provided for in the constitution. The election shall take place not earlier than 3 months nor later than 6 months after the proclamation by the Governor General ordering such election. When the election of the officers provided for under the constitution has been held and the results determined, the Governor General of the Philippine Islands shall certify the results of the election to the President of the United States, who shall thereupon issue a proclamation announcing the results of the election, and upon the issuance of such proclamation by the President the existing Philippine government shall terminate and the new government shall enter upon its rights, privileges, powers, and duties, as provided under the constitution. The present government of the Philippine Islands shall provide for the orderly transfer of the functions of government.

If a majority of the votes cast are against the constitution, the existing government of the Philippine Islands shall continue without regard to the provisions of this act.

## TRANSFER OF PROPERTY AND RIGHTS TO PHILIPPINE COMMONWEALTH

SEC. 5. All the property and rights which may have been acquired in the Philippine Islands by the United States under the treaties mentioned

in the first section of this act, except such land or other property as has heretofore been designated by the President of the United States for military and other reservations of the Government of the United States, and except such land or other property or rights or interests therein as may have been sold or otherwise disposed of in accordance with law, are hereby granted to the government of the Commonwealth of the Philippine Islands when constituted.

RELATIONS WITH THE UNITED STATES PENDING COMPLETE  
INDEPENDENCE

SEC. 6. After the date of the inauguration of the government of the Commonwealth of the Philippine Islands trade relations between the United States and the Philippine Islands shall be as now provided by law, subject to the following exceptions:

(a) There shall be levied, collected, and paid on all refined sugars in excess of 50,000 long tons, and on unrefined sugars in excess of 800,000 long tons, coming into the United States from the Philippine Islands in any calendar year, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(b) There shall be levied, collected, and paid on all coconut oil coming into the United States from the Philippine Islands in any calendar year in excess of 200,000 long tons, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(c) There shall be levied, collected, and paid on all yarn, twine, cord, cordage, rope, and cable, tarred or untarred, wholly or in chief value of manila (abaca) or other hard fibers, coming into the United States from the Philippine Islands in any calendar year in excess of a collective total of 3,000,000 pounds of all such articles hereinbefore enumerated, the same rates of duty which are required by the laws of the United States to be levied, collected, and paid upon like articles imported from foreign countries.

(d) In the event that in any year the limit in the case of any article which may be exported to the United States free of duty shall be reached by the Philippine Islands, the amount or quantity of such articles produced or manufactured in the Philippine Islands thereafter that may be so exported to the United States free of duty shall be allocated, under export permits issued by the government of the Commonwealth of the Philippine Islands, to the producers or manufacturers of such articles

proportionately on the basis of their exportation to the United States in the preceding year; except that in the case of unrefined sugar the amount thereof to be exported annually to the United States free of duty shall be allocated to the sugar-producing mills of the islands proportionately on the basis of their average annual production for the calendar years 1931, 1932, and 1933, and the amount of sugar from each mill which may be so exported shall be allocated in each year between the mill and the planters on the basis of the proportion of sugar to which the mill and the planters are respectively entitled. The government of the Philippine Islands is authorized to adopt the necessary laws and regulations for putting into effect the allocation hereinbefore provided.

(e) The government of the Commonwealth of the Philippine Islands shall impose and collect an export tax on all articles that may be exported to the United States from the Philippine Islands free of duty under the provisions of existing law as modified by the foregoing provisions of this section, including the articles enumerated in subdivisions (a), (b), and (c), within the limitations therein specified, as follows:

(1) During the sixth year after the inauguration of the new government the export tax shall be 5 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(2) During the seventh year after the inauguration of the new government the export tax shall be 10 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(3) During the eighth year after the inauguration of the new government the export tax shall be 15 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(4) During the ninth year after the inauguration of the new government the export tax shall be 20 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(5) After the expiration of the ninth year after the inauguration of the new government the export tax shall be 25 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries.

The government of the Commonwealth of the Philippine Islands shall place all funds received from such export taxes in a sinking fund, and such funds shall, in addition to other moneys available for that purpose, be applied solely to the payment of the principal and interest on the

bonded indebtedness of the Philippine Islands, its Provinces, municipalities, and instrumentalities, until such indebtedness has been fully discharged.

When used in this section in a geographical sense, the term "United States" includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam.

SEC. 7. Until the final and complete withdrawal of American sovereignty over the Philippine Islands—

(1) Every duly adopted amendment to the constitution of the government of the Commonwealth of the Philippine Islands shall be submitted to the President of the United States for approval. If the President approves the amendment or if the President fails to disapprove such amendment within 6 months from the time of its submission, the amendment shall take effect as a part of such constitution.

(2) The President of the United States shall have authority to suspend the taking effect of or the operation of any law, contract, or executive order of the government of the Commonwealth of the Philippine Islands, which in his judgment will result in a failure of the government of the Commonwealth of the Philippine Islands to fulfill its contracts, or to meet its bonded indebtedness and interest thereon or to provide for its sinking funds, or which seems likely to impair the reserves for the protection of the currency of the Philippine Islands, or which in his judgment will violate international obligations of the United States.

(3) The chief executive of the Commonwealth of the Philippine Islands shall make an annual report to the President and Congress of the United States of the proceedings and operations of the government of the Commonwealth of the Philippine Islands and shall make such other reports as the President or Congress may request.

(4) The President shall appoint, by and with the advice and consent of the Senate, a United States High Commissioner to the government of the Commonwealth of the Philippine Islands who shall hold office at the pleasure of the President and until his successor is appointed and qualified. He shall be known as the United States High Commissioner of the Philippine Islands. He shall be the representative of the President of the United States in the Philippine Islands and shall be recognized as such by the government of the Commonwealth of the Philippine Islands, by the commanding officers of the military forces of the United States, and by all civil officials of the United States in the Philippine Islands. He shall have access to all records of the government or any subdivision thereof, and shall be furnished by the Chief Executive of the Common-

proportionately on the basis of their exportation to the United States in the preceding year; except that in the case of unrefined sugar the amount thereof to be exported annually to the United States free of duty shall be allocated to the sugar-producing mills of the islands proportionately on the basis of their average annual production for the calendar years 1931, 1932, and 1933, and the amount of sugar from each mill which may be so exported shall be allocated in each year between the mill and the planters on the basis of the proportion of sugar to which the mill and the planters are respectively entitled. The government of the Philippine Islands is authorized to adopt the necessary laws and regulations for putting into effect the allocation hereinbefore provided.

(e) The government of the Commonwealth of the Philippine Islands shall impose and collect an export tax on all articles that may be exported to the United States from the Philippine Islands free of duty under the provisions of existing law as modified by the foregoing provisions of this section, including the articles enumerated in subdivisions (a), (b), and (c), within the limitations therein specified, as follows:

(1) During the sixth year after the inauguration of the new government the export tax shall be 5 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(2) During the seventh year after the inauguration of the new government the export tax shall be 10 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(3) During the eighth year after the inauguration of the new government the export tax shall be 15 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(4) During the ninth year after the inauguration of the new government the export tax shall be 20 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries;

(5) After the expiration of the ninth year after the inauguration of the new government the export tax shall be 25 percent of the rates of duty which are required by the laws of the United States to be levied, collected, and paid on like articles imported from foreign countries.

The government of the Commonwealth of the Philippine Islands shall place all funds received from such export taxes in a sinking fund, and such funds shall, in addition to other moneys available for that purpose, be applied solely to the payment of the principal and interest on the

bonded indebtedness of the Philippine Islands, its Provinces, municipalities, and instrumentalities, until such indebtedness has been fully discharged.

When used in this section in a geographical sense, the term "United States" includes all Territories and possessions of the United States, except the Philippine Islands, the Virgin Islands, American Samoa, and the island of Guam.

SEC. 7. Until the final and complete withdrawal of American sovereignty over the Philippine Islands—

(1) Every duly adopted amendment to the constitution of the government of the Commonwealth of the Philippine Islands shall be submitted to the President of the United States for approval. If the President approves the amendment or if the President fails to disapprove such amendment within 6 months from the time of its submission, the amendment shall take effect as a part of such constitution.

(2) The President of the United States shall have authority to suspend the taking effect of or the operation of any law, contract, or executive order of the government of the Commonwealth of the Philippine Islands, which in his judgment will result in a failure of the government of the Commonwealth of the Philippine Islands to fulfill its contracts, or to meet its bonded indebtedness and interest thereon or to provide for its sinking funds, or which seems likely to impair the reserves for the protection of the currency of the Philippine Islands, or which in his judgment will violate international obligations of the United States.

(3) The chief executive of the Commonwealth of the Philippine Islands shall make an annual report to the President and Congress of the United States of the proceedings and operations of the government of the Commonwealth of the Philippine Islands and shall make such other reports as the President or Congress may request.

(4) The President shall appoint, by and with the advice and consent of the Senate, a United States High Commissioner to the government of the Commonwealth of the Philippine Islands who shall hold office at the pleasure of the President and until his successor is appointed and qualified. He shall be known as the United States High Commissioner of the Philippine Islands. He shall be the representative of the President of the United States in the Philippine Islands and shall be recognized as such by the government of the Commonwealth of the Philippine Islands, by the commanding officers of the military forces of the United States, and by all civil officials of the United States in the Philippine Islands. He shall have access to all records of the government or any subdivision thereof, and shall be furnished by the Chief Executive of the Common-



wealth of the Philippine Islands with such information as he shall request.

If the government of the Commonwealth of the Philippine Islands fails to pay any of its bonded or other indebtedness or the interest thereon when due or to fulfill any of its contracts, the United States High Commissioner shall immediately report the facts to the President, who may thereupon direct the High Commissioner to take over the customs offices and administration of the same, administer the same, and apply such part of the revenue received therefrom as may be necessary for the payment of such overdue indebtedness or for the fulfillment of such contracts. The United States High Commissioner shall annually, and at such other times as the President may require, render an official report to the President and Congress of the United States. He shall perform such additional duties and functions as may be delegated to him from time to time by the President under the provisions of this act.

The United States High Commissioner shall receive the same compensation as is now received by the Governor General of the Philippine Islands, and shall have such staff and assistants as the President may deem advisable and as may be appropriated for by Congress, including a financial expert, who shall receive for submission to the High Commissioner a duplicate copy of the reports of the insular auditor. Appeals from decisions of the insular auditor may be taken to the President of the United States. The salaries and expenses of the High Commissioner and his staff and assistants shall be paid by the United States.

The first United States High Commissioner appointed under this act shall take office upon the inauguration of the new government of the Commonwealth of the Philippine Islands.

(5) The government of the Commonwealth of the Philippine Islands shall provide for the selection of a Resident Commissioner to the United States, and shall fix his term of office. He shall be the representative of the government of the Commonwealth of the Philippine Islands and shall be entitled to official recognition as such by all departments upon presentation to the President of credentials signed by the Chief Executive of said government. He shall have a seat in the House of Representatives of the United States, with the right of debate, but without the right of voting. His salary and expenses shall be fixed and paid by the government of the Philippine Islands. Until a Resident Commissioner is selected and qualified under this section, existing law governing the appointment of Resident Commissioners from the Philippine Islands shall continue in effect.

(6) Review by the Supreme Court of the United States of cases from

the Philippine Islands shall be as now provided by law; and such review shall also extend to all cases involving the constitution of the Commonwealth of the Philippine Islands.

SEC. 8. (a) Effective upon the acceptance of this act by concurrent resolution of the Philippine Legislature or by a convention called for that purpose, as provided in section 17—

(1) For the purposes of the Immigration Act of 1917, the Immigration Act of 1924 (except sec. 13 (c)), this section, and all other laws of the United States relating to the immigration, exclusion, or expulsion of aliens, citizens of the Philippine Islands who are not citizens of the United States shall be considered as if they were aliens. For such purposes the Philippine Islands shall be considered as a separate country and shall have for each fiscal year a quota of 50. This paragraph shall not apply to a person coming or seeking to come to the Territory of Hawaii who does not apply for and secure an immigration or passport visa, but such immigration shall be determined by the Department of the Interior on the basis of the needs of industries in the Territory of Hawaii.

(2) Citizens of the Philippine Islands who are not citizens of the United States shall not be admitted to the continental United States from the Territory of Hawaii (whether entering such Territory before or after the effective date of this section) unless they belong to a class declared to be nonimmigrants by section 3 of the Immigration Act of 1924 or to a class declared to be nonquota immigrants under the provisions of section 4 of such act other than subdivision (c) thereof, or unless they were admitted to such Territory under an immigration visa. The Secretary of Labor shall by regulations provide a method for such exclusion and for the admission of such excepted classes.

(3) Any Foreign Service Officer may be assigned to duty in the Philippine Islands, under a commission as a consular officer, for such period as may be necessary and under such regulations as the Secretary of State may prescribe, during which assignment such officer shall be considered as stationed in a foreign country; but his powers and duties shall be confined to the performance of such of the official acts and notarial and other services, which such officer might properly perform in respect of the administration of the immigration laws if assigned to a foreign country as a consular officer, as may be authorized by the Secretary of State.

(4) For the purposes of sections 18 and 20 of the Immigration Act of 1917, as amended, the Philippine Islands shall be considered to be a foreign country.

(b) The provisions of this section are in addition to the provisions of the immigration laws now in force, and shall be enforced as a part of such laws, and all the penal or other provisions of such laws, not inapplicable, shall apply to and be enforced in connection with the provisions of this section. An alien, although admissible under the provisions of this section, shall not be admitted to the United States if he is excluded by any provision of the immigration laws other than this section, and an alien, although admissible under the provisions of the immigration laws other than this section, shall not be admitted to the United States if he is excluded by any provision of this section.

(c) Terms defined in the Immigration Act of 1924 shall, when used in this section, have the meaning assigned to such terms in that act.

SEC. 9. There shall be no obligation on the part of the United States to meet the interest or principal of bonds and other obligations of the government of the Philippine Islands or of the provincial and municipal governments thereof, hereafter issued during the continuance of United States sovereignty in the Philippine Islands: *Provided*, That such bonds and obligations hereafter issued shall not be exempt from taxation in the United States or by authority of the United States.

#### RECOGNITION OF PHILIPPINE INDEPENDENCE AND WITHDRAWAL OF AMERICAN SOVEREIGNTY

SEC. 10. (a) On the 4th day of July immediately following the expiration of a period of 10 years from the date of the inauguration of the new government under the constitution provided for in this act the President of the United States shall by proclamation withdraw and surrender all right of possession, supervision, jurisdiction, control, or sovereignty then existing and exercised by the United States in and over the territory and people of the Philippine Islands, including all military and other reservations of the Government of the United States in the Philippines (except such naval reservations and fueling stations as are reserved under sec. 5), and, on behalf of the United States, shall recognize the independence of the Philippine Islands as a separate and self-governing nation and acknowledge the authority and control over the same as the government instituted by the people thereof under the constitution then in force.

(b) The President of the United States is hereby authorized and empowered to enter into negotiations with the government of the Philippine Islands, not later than 2 years after his proclamation recognizing the independence of the Philippine Islands, for the adjustment and set-

tlement of all questions relating to naval reservations and fueling stations of the United States in the Philippine Islands, and pending such adjustment and settlement the matter of naval reservations and fueling stations shall remain in its present status.

#### NEUTRALIZATION OF PHILIPPINE ISLANDS

SEC. 11. The President is requested, at the earliest practicable date, to enter into negotiations with foreign powers with a view to the conclusion of a treaty for the perpetual neutralization of the Philippine Islands, if and when Philippine independence shall have been achieved.

#### NOTIFICATION TO FOREIGN GOVERNMENTS

SEC. 12. Upon the proclamation and recognition of the independence of the Philippine Islands, the President shall notify the governments with which the United States is in diplomatic correspondence thereof and invite said governments to recognize the independence of the Philippine Islands.

#### TARIFF DUTIES AFTER INDEPENDENCE

SEC. 13. After the Philippine Islands have become a free and independent nation there shall be levied, collected, and paid upon all articles coming into the United States from the Philippine Islands the rates of duty which are required to be levied, collected, and paid upon like articles imported from other foreign countries: *Provided*, That at least 1 year prior to the date fixed in this act for the independence of the Philippine Islands, there shall be held a conference of representatives of the Government of the United States and the government of the Commonwealth of the Philippine Islands, such representatives to be appointed by the President of the United States and the Chief Executive of the Commonwealth of the Philippine Islands, respectively, for the purpose of formulating recommendations as to future trade relations between the Government of the United States and the independent government of the Philippine Islands, the time, place, and manner of holding such conference to be determined by the President of the United States; but nothing in this proviso shall be construed to modify or affect in any way any provision of this act relating to the procedure leading up to Philippine independence or the date upon which the Philippine Islands shall become independent.

## IMMIGRATION AFTER INDEPENDENCE

SEC. 14. Upon the final and complete withdrawal of American sovereignty over the Philippine Islands the immigration laws of the United States (including all the provisions thereof relating to persons ineligible to citizenship) shall apply to persons who were born in the Philippine Islands to the same extent as in the case of other foreign countries.

## CERTAIN STATUTES CONTINUED IN FORCE

SEC. 15. Except as in this act otherwise provided, the laws now or hereafter in force in the Philippine Islands shall continue in force in the Commonwealth of the Philippine Islands until altered, amended, or repealed by the Legislature of the Commonwealth of the Philippine Islands or by the Congress of the United States, and all references in such laws to the government or officials of the Philippines or Philippine Islands shall be construed, insofar as applicable, to refer to the government and corresponding officials respectively of the Commonwealth of the Philippine Islands. The government of the Commonwealth of the Philippine Islands shall be deemed successor to the present government of the Philippine Islands and of all the rights and obligations thereof. Except as otherwise provided in this act, all laws or parts of laws relating to the present government of the Philippine Islands and its administration are hereby repealed as of the date of the inauguration of the government of the Commonwealth of the Philippine Islands.

SEC. 16. If any provision of this act is declared unconstitutional or the applicability thereof to any person or circumstance is held invalid, the validity of the remainder of the act and the applicability of such provisions to other persons and circumstances shall not be affected thereby.

## EFFECTIVE DATE

SEC. 17. The foregoing provisions of this act shall not take effect until accepted by concurrent resolution of the Philippine Legislature or by a convention called for the purpose of passing upon that question as may be provided by the Philippine Legislature.

Approved, March 24, 1934.

**b. Philippine Constitution**

[Adopted by Philippine Constitutional Convention, Feb. 8, 1935; approved by President Roosevelt, Mar. 23, 1935; ratified by Philippine people, May 14, 1935 (1,213,046-44,963); effective Nov. 15, 1935.]

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ARTICLE XV. TRANSITORY PROVISIONS

SECTION 1. The first election of the officers provided in this constitution and the inauguration of the Government of the Commonwealth of the Philippines shall take place as provided in Public Act. No. 127 of the Congress of the United States, approved March 24, 1934.

SEC. 2. All laws of the Philippine Islands shall continue in force until the inauguration of the Commonwealth of the Philippines; thereafter, such laws shall remain operative, unless inconsistent with this constitution, until amended, altered, modified, or repealed by the national assembly, and all references in such laws to the government or officials of the Philippine Islands shall be construed, insofar as applicable, to refer to the government and corresponding officials under this constitution.

SEC. 3. All courts existing at the time of the adoption of this constitution shall continue and exercise their jurisdiction until otherwise provided by law in accordance with this constitution, and all cases, civil and criminal, pending in said courts, shall be heard, tried and determined under the laws then in force.

SEC. 4. All officers and employees in the existing government of the Philippine Islands shall continue in office until the national assembly shall provide otherwise, but all officers whose appointments are by this constitution vested in the president shall vacate their respective offices upon the appointment and qualification of their successors, if such appointment is made within a period of 1 year from the date of the inauguration of the Commonwealth of the Philippines.

SEC. 5. The members of the national assembly for the mountain Provinces shall be elected as may be provided by law. The voters of municipalities and municipal districts formerly belonging to a special Province and now forming part of regular Provinces shall vote in the election for members of the national assembly in such districts as may be provided by law.

SEC. 6. The provisions of this constitution, except those contained in this article and in article V, and those which refer to the election and qualification of officers to be elected under this constitution, shall not take effect until the inauguration of the Commonwealth of the Philippines.

ARTICLE XVI. SPECIAL PROVISIONS EFFECTIVE UPON THE PROCLAMATION OF THE INDEPENDENCE OF THE PHILIPPINES

SECTION 1. Upon the proclamation of the President of the United States recognizing the independence of the Philippines:



(1) The property rights of the United States and the Philippines shall be promptly adjusted and settled, and all existing property rights of citizens or corporations of the United States shall be acknowledged, respected, and safeguarded to the same extent as property rights of citizens of the Philippines.

(2) The officials elected and serving under this constitution shall be constitutional officers of the free and independent government of the Philippines and qualified to function in all respects as if elected directly under such government, and shall serve their full terms of office as prescribed in this constitution.

(3) The debts and liabilities of the Philippines, its Provinces, cities, municipalities, and instrumentalities, which shall be valid and subsisting at the time of the final and complete withdrawal of the sovereignty of the United States, shall be assumed by the free and independent government of the Philippines; and where bonds have been issued under authority of an act of Congress of the United States by the Philippine Islands, or any Province, city, or municipality thereof, the government of the Philippines will make adequate provision for the necessary funds for the payment of interest and principal, and such obligations shall be a first lien on all taxes collected.

(4) The government of the Philippines will assume all continuing obligations of the United States under the treaty of peace with Spain ceding the Philippines to the United States.

(5) The government of the Philippines will embody the foregoing provisions of this article (except subsec. (2)) in a treaty with the United States.

## ARTICLE XVII. THE COMMONWEALTH AND THE REPUBLIC

SECTION 1. The government established by this constitution shall be known as the "Commonwealth of the Philippines." Upon the final and complete withdrawal of the sovereignty of the United States and the proclamation of Philippine independence, the Commonwealth of the Philippines shall thenceforth be known as the "Republic of the Philippines."

## ORDINANCE APPENDED TO THE CONSTITUTION

SECTION 1. Notwithstanding the provisions of the foregoing constitution, pending the final and complete withdrawal of the sovereignty of the United States over the Philippines—

(1) All citizens of the Philippines shall owe allegiance to the United States.

(2) Every official of the government of the Commonwealth of the Philippines shall, before entering upon the discharge of his duties, take and subscribe an oath of office, declaring, among other things, that he recognizes and accepts the supreme authority of and will maintain true faith and allegiance to the United States.

(3) Absolute toleration of religious sentiment shall be secured and no inhabitant or religious organization shall be molested in person or property on account of religious belief or mode of worship.

(4) Property owned by the United States—cemeteries, churches, and parsonages or convents apurtenant thereto, and all lands, buildings, and improvements used exclusively for religious, charitable, or educational purposes—shall be exempt from taxation.

(5) Trade relations between the Philippines and the United States shall be upon the basis prescribed in section 6 of Public Act No. 127 of the Congress of the United States, approved March 24, 1934.

(6) The public debt of the Philippines and its subordinate branches shall not exceed limits now or hereafter fixed by the Congress of the United States, and no loans shall be contracted in foreign countries without the approval of the President of the United States.

(7) The debts, liabilities, and obligations of the present government of the Philippine Islands, its provinces, municipalities, and instrumentalities, valid and subsisting at the time of the adoption of the constitution, shall be assumed and paid by the government of the Commonwealth of the Philippines.

(8) The government of the Commonwealth of the Philippines shall establish and maintain an adequate system of public schools, primarily conducted in the English language.

(9) Acts affecting currency, coinage, imports, exports, and immigration shall not become law until approved by the President of the United States.

(10) Foreign affairs shall be under the direct supervision and control of the United States.

(11) All acts passed by the national assembly of the Commonwealth of the Philippines shall be reported to the Congress of the United States.

(12) The Philippines recognizes the right of the United States to expropriate property for public uses, to maintain military and other reservations and armed forces in the Philippines, and, upon order of the President of the United States, to call into the service of such armed

forces all military forces organized by the government of the Commonwealth of the Philippines.

(13) The decisions of the courts of the Philippines shall be subject to review by the Supreme Court of the United States as now provided by law, and such review shall also extend to all cases involving the constitution of the Philippines.

(14) Appeals from decisions of the auditor general may be taken to the President of the United States.

(15) The United States may, by Presidential proclamation, exercise the right to intervene for the preservation of the government of the Commonwealth of the Philippines and for the maintenance of the government as provided in the constitution thereof, and for the protection of life, property, and individual liberty and for the discharge of government obligations under and in accordance with the provisions of the constitution.

(16) The authority of the United States high commissioner to the government of the Commonwealth of the Philippines as provided in Public Act No. 127 of the Congress of the United States, approved March 24, 1934, is hereby recognized.

(17) Citizens and corporations of the United States shall enjoy in the Commonwealth of the Philippines all the civil rights of the citizens and corporations, respectively, thereof.

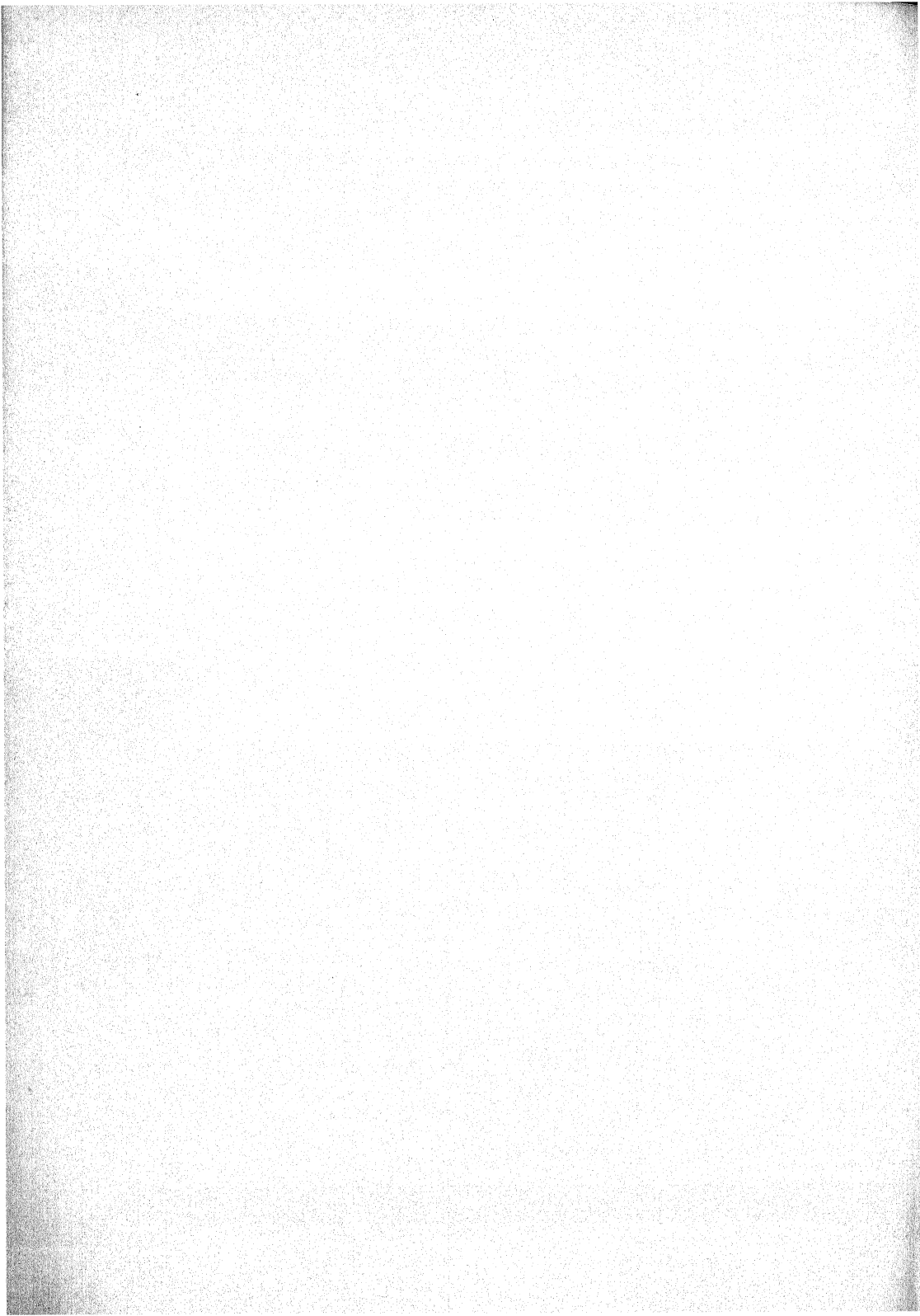
(18) Every duly adopted amendment to the constitution of the Philippines shall be submitted to the President of the United States for approval. If the President approves the amendment within 6 months from the time of its submission, the amendment shall take effect as a part of such constitution.

(19) The President of the United States shall have authority to suspend the taking effect of or the operation of any law, contract, or executive order of the government of the Commonwealth of the Philippines, which, in his judgment, will result in a failure of the government of the Commonwealth of the Philippines to fulfill its contracts, or to meet its bonded indebtedness and interests thereon or to provide for its sinking funds, or which seem likely to impair the reserves for the protection of the currency of the Philippines, or which in his judgment will violate international obligations of the United States.

(20) The president of the Commonwealth of the Philippines shall make an annual report to the President and Congress of the United States of the proceedings and operations of the government of the Commonwealth of the Philippines and shall make such other reports as the President or Congress may request.

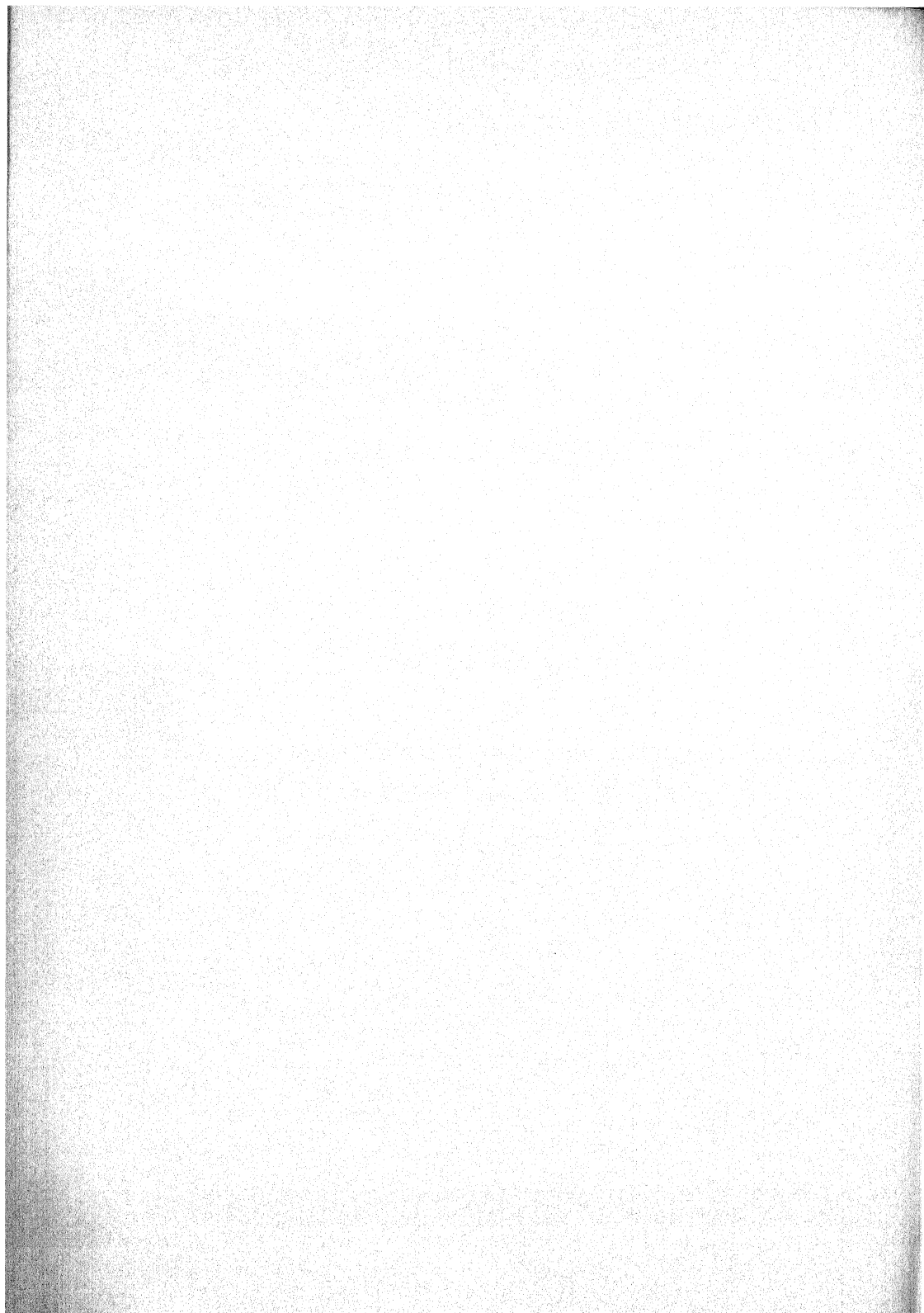
SEC. 2. Pending the final and complete withdrawal of the sovereignty of the United States over the Philippines, there shall be a Resident Commissioner of the Philippines to the United States who shall be appointed by the president of the Commonwealth of the Philippines with the consent of the commission on appointments. The powers and duties of the Resident Commissioner shall be as provided in section 7, paragraph 5 of Public Act No. 127 of the Congress of the United States, approved March 24, 1934, together with such other duties as the national assembly may determine. The qualifications, compensation, and expenses of the Resident Commissioner shall be fixed by law.

SEC. 3. All other provisions of Public Act No. 127 of the Congress of the United States, approved March 24, 1934, applicable to the government of the Commonwealth of the Philippines, are hereby made a part of this ordinance as if such provisions were expressly inserted herein.



PART IV  
STATE GOVERNMENT





## CHAPTER XIX

### THE STATE CONSTITUTION

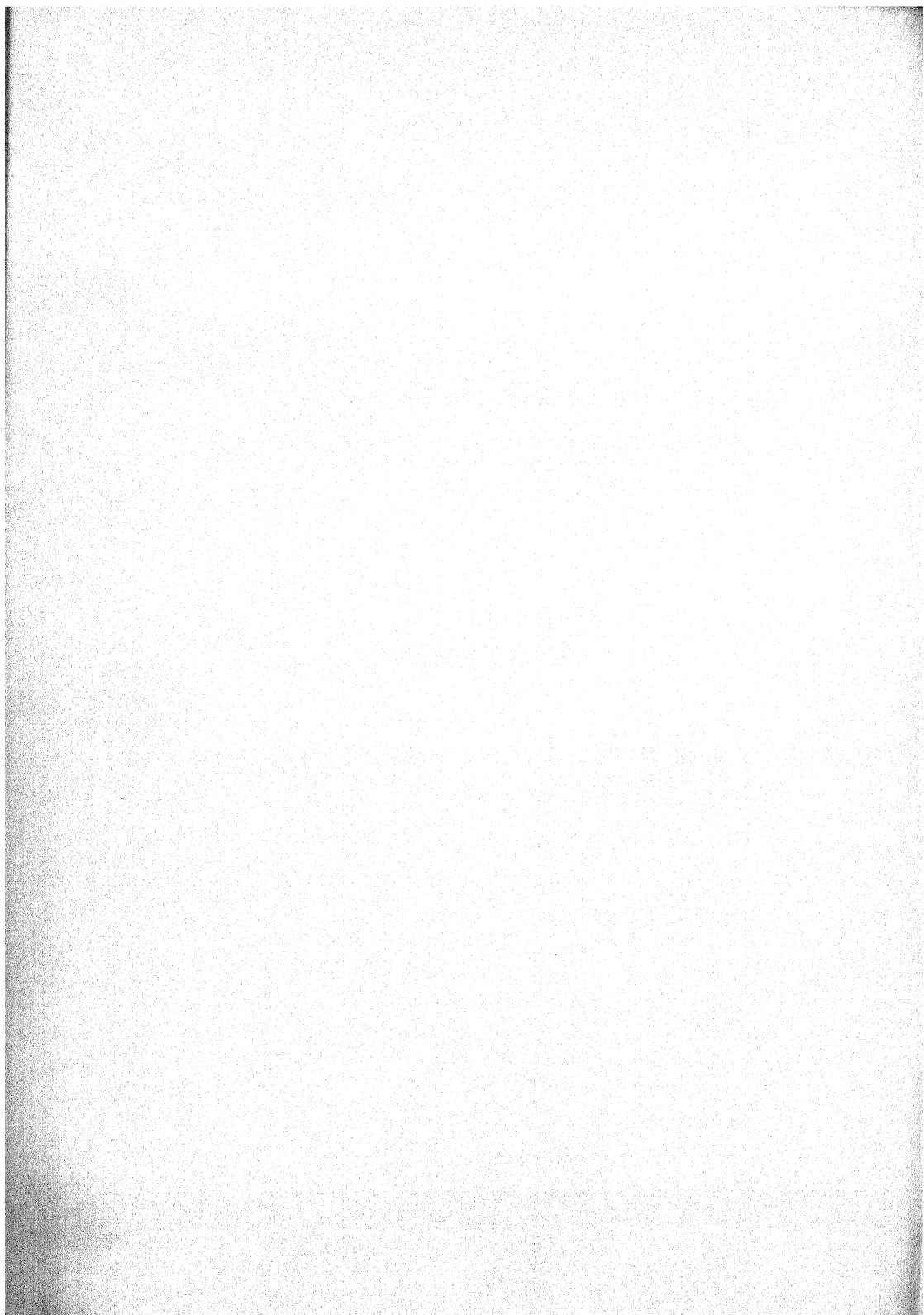
#### 114. PROVISION FOR CONSTITUTIONAL CONVENTION

A constitutional convention may, as a rule, be called only in accordance with the existing state constitution. Most of these instruments make provision, to some extent at least, for the calling of conventions. However, the lack of such provision does not necessarily prevent the holding of conventions, as in all states but one (Rhode Island) the courts have affirmed the inherent right of the legislature to provide for conventions without specific authorization. In at least one state (North Dakota), the right of the legislature itself to act in effect as such constitutional convention has been upheld.

##### a. Constitutional Provision for Constitutional Convention

[*Illinois Constitution of 1870*, Art. XIV, Sec. 1.]

Whenever two-thirds of the members of each house of the general assembly shall, by a vote entered upon the journals thereof, concur that a convention is necessary to revise, alter or amend the constitution, the question shall be submitted to the electors at the next general election. If a majority voting at the election vote for a convention, the general assembly shall, at the next session, provide for a convention, to consist of double the number of members of the senate, to be elected in the same manner, at the same places, and in the same districts. The general assembly shall, in the act calling the convention, designate the day, hour and place of its meeting, fix the pay of its members and officers, and provide for the payment of the same, together with expenses necessarily incurred by the convention in the performance of its duties. Before proceeding, the members shall take an oath to support the constitution of the United States, and of the State of Illinois, and to faithfully discharge their duties as members of the convention. The qualification of members shall be the same as that of members of the senate, and vacancies occurring shall be filled in the manner provided for filling vacancies in the general assembly. Said convention shall meet within three months after such election, and prepare such revision, alteration or amendments of the constitution as shall be deemed necessary, which shall be submitted to the electors for their ratification or rejection, at an election ap-



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pointed by the convention for that purpose, not less than two nor more than six months after the adjournment thereof; and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alterations or amendments shall take effect.

#### b. Power of Legislature in North Dakota

[Opinion of Attorney General Langer, in *Election Laws of the State of North Dakota, 1921*, pp. 320-325.]

Gov. Lynn J. Frazier, State Capitol, Bismarck, North Dakota.

Honorable Sir:

I have your request, under date of January 13, 1917, for an opinion as to the legality of House Bill No. 44. This is a Concurrent Resolution, embodying a new or revised Constitution and composed of over two hundred different sections, besides a "Schedule" which provides, among other things, that the proposed Constitution shall be submitted to the people for adoption or rejection at a special election to be held on the last Wednesday in June, 1917.

In giving this opinion I shall confine myself to the single question of the legality of the method of procedure by which this revision is sought to be brought about, and shall make no comment upon the wisdom or expediency of such method or upon the substance of particular sections contained in such resolution.

At first glance and in the light of methods or reasoning applicable to ordinary statutory and constitutional questions, it might seem that the proposed method of revision is illegal, but when viewed in its true light—that of the fundamental principles of our government and of the people's sovereignty—in my opinion, formed after carefully briefing the strongest objections to it, the proposed method of revision is clearly constitutional and the arguments in favor of its legality unanswerable.

An examination of our State and Federal Constitution shows that no procedure for revision or for the adoption of a new State Constitution, as an organic [*sic*], is provided for.

The Constitution of North Dakota, Section 2, however, does contain the following declaration:

"All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people; and they have the right to alter or reform the same whenever the public good may require."

Moreover, in our system of government, constitutions derive their power from the people, not the people from constitutions. The rights

and powers of the people existed before a constitution was formed. In other words, before the establishment of a constitution, the people possessed sovereign power.

That power, they still possess, except in so far as they may have delegated it to State or National Governments, or have voluntarily restricted themselves in its exercise under their constitutions. In determining what portion of the sovereign power the people have temporarily parted with under their constitutions, the rule is clear, namely, that the people have delegated no sovereign power unless such delegation of power is set forth in express terms.

In the United States, out of their original sovereign power, the people have carved, first, the Federal Constitution, with its delegation of power to the National Government, and second, the State Constitutions, with their delegations of power to the various state governments. Neither National nor State Governments have any powers except such as are conferred upon them directly, nor are the people restricted in the exercise of their sovereignty, except as they have expressly laid down restrictions in the Federal and State Constitution.

Many of our states have adopted express methods of revising their constitutions through constitutional conventions. However, for generations, many states had no express method of revision, and at least a dozen states, North Dakota being among them, have none today.

However, in view of the admitted theory of the people's sovereignty it is universally agreed that the people of a state do have the inherent power to revise their constitutions, that is, to adopt a new and complete organic law, even though no special method for the exercise of such power is prescribed in the existing constitution.

The power of revision being thus conceded on all sides, the question then arises as to how states without any express method of revision could in the past, or can today, proceed to revise their constitutions.

The answer to this question is that the people of such states, being without practical facilities to convene as a body and initiate new constitutions themselves, have in their legislatures, instruments through which the initiative may be taken to bring before the people, for ratification or rejection, new and revised constitutions. This practice is inevitable, and is founded upon the broad right of the people to retain their inherent power of revision unstified by a mere lack of express methods of procedure for revision.

In initiating revision and in setting in motion machinery by which revision is placed before the people so that they may act upon them in their sovereign capacity, it is conceded on all sides that legislatures do not act



in a strictly legislative capacity, but are of necessity for the time being mere instruments for setting in motion the sovereign power of the people.

This right of the legislature is conceded by every authority on constitutional law, upon the simple ground of necessity. The sovereign power by the people works to that extent through the legislature, as the human body breathes through the mouth or nostrils for the reason that no other method of breathing is provided by nature. Thus far authorities are in harmony and there is no ground for dispute.

Bearing these facts in mind:

1. That the people, in the absence of express provisions as to procedure in their constitutions, nevertheless, have the right of revision, and

2. That the initial step to start the sovereign power in motion must under circumstances be taken by state legislatures, the question further narrows down to the particular method which a state legislature must pursue in initiating a revision.

This, in my opinion, brings us to the crucial point of the entire question.

In cases where constitutions contain no express provision for procedure and no express restriction on procedure, and where it is conceded that the people have the power to revise their constitutions, as well as that the legislature must initiate such revision by one method or another, IN MY OPINION ANY METHOD FOLLOWED BY THE LEGISLATURE IN PLACING BEFORE THE PEOPLE A NEW CONSTITUTION FOR ADOPTION OR REJECTION IN THEIR SOVEREIGN CAPACITY IS LEGAL. Any other conclusion is a denial of the sovereign power of the people or a partial restriction of that power utterly unwarranted by our Constitution and accepted rules of constitutional interpretation. It would be in direct contravention of our American theory that popular sovereignty is restricted in the exercise of its powers only by express written prohibitions contained in constitutions, as set forth in the first section of this opinion.

The truth is that the argument in favor of revision by constitutional convention as opposed to revision by commission or legislative action is not an argument of legality, but solely of expediency. The possible greater expediency or wisdom of the convention method has been mistaken by its advocates for exclusive legality.

Dodd, in his authoritative work, the *Revision and Amendment of State Constitutions*, page 261, has stated this point clearly and conclusively:

"Judge Jameson has said as to the legislative method of proposing amendments: 'It ought to be confined, it is believed, to changes which are few, simple, independent, and of comparatively small importance. For a general revision of a Constitution, or even for single propositions involving radical changes as to the policy of which the popular mind has

not been informed by prior discussion, the employment of this mode is impracticable, or of doubtful expediency.' Judge Jameson's point is purely one as to expedience, and it is legally proper, it would seem, in the absence of specific constitutional restrictions, to propose to the people by the legislative process any constitutional alteration short of a complete revision, or even complete revision."

The real merit of revision by convention over legislative revision appears to lie in the fact that the constitutional convention, elected solely upon the issue of revision, is likely to be more carefully selected, to contain a greater number of men specially fitted for the task and to approach its task with greater deliberation and more concentrated energy. This may all be true. The same consideration probably will hold good in connection with revision by a commission appointed by the legislature, and yet all these considerations merely go to the expediency of the method, not to its legality.

When once we concede that the legislature has authority to set in motion this great sovereign power of the people by initiating revision, then, upon the mere ground of reasoning by implication and without written authority, who are we to say the sovereignty of the people shall from thence on be exercised only in one certain narrow way? We may say that it is inadvisable, that it is unwise, that it is inexpedient, for it to be exercised in that manner, BUT WE ARE UNABLE IN THE LIGHT OF AMERICAN INSTITUTIONS, TO SAY THAT IT CANNOT BE SO EXERCISED.

The sovereign power of revision having reached the threshold of the legislature without express written authority and solely by its irresistible right to expression what mysterious power can then, without vestige of authority, assume the right to bridle it and lead it tamely down the narrow, though highly respectable avenue of revision by convention?

Any other conclusion as to the rule under our constitution must wrongfully seek by mere implication to restrict the sovereign power of revision to the narrow channel of constitutional conventions. The ground for conceding to the legislature the right to initiate revision is the compelling power of necessity, no other method being provided. No such necessity exists to restrict the sovereign power as to any particular method of revision through the initiative or the legislature. In fact, such a restriction would rest upon the most doubtful reasoning (as to legally distinguished [*sic*] from expediency). Opposed to it would be the inherent right of the people to secure the freest possible expression of their sovereign power. Under these circumstances, and, in the absence of any written restriction to the contrary, every presumption of legality is in favor of whatever method the legislature may adopt and such method will prevail.

It is urged, that since our Constitution provides a method of amendment, by exclusion the Legislature is prohibited from initiating a revision itself by drafting a new Constitution. This argument is untenable when dealing with sovereignty of the people seeking expression through revision. It is an instance where the ordinary doctrine of exclusion, applicable to contracts is not binding. Moreover, if such an argument were applicable to legislative revision it would be equally applicable to revision by convention, and on that subject our own Supreme Court in 68 N. W. 421 (N. D.), has said:

"The decided weight of authority and the more numerous precedents are arrayed on the side of the doctrine which supports the existence of this inherent legislative power to call a constitutional convention, notwithstanding the fact that the instrument itself points out how it may be amended."

A revised constitution, in the sense applicable to this question, is a constitution, altered in part or changed completely, but in form a complete document and to be submitted as a whole and standing or falling as a whole. Amendments relate to particular sections, and are submitted as such to be voted upon separately. It is the submission of a document as an organic whole which distinguishes a revised and new constitution from mere amendments.

In connection with this I will also say that the case of *Ellingham vs. Dye*, 99 N. E. 1, apparently opposed to the legality of legislative revision, is clearly not applicable to the situation in this State, owing to an unusual and perhaps, entirely unique occurrence in the history of Indiana when the provisions for revision contained in the Indiana constitution up to 1851 were then stricken out with the express intention that NEVER AGAIN WOULD THE INDIANA CONSTITUTION BE REVISED BUT ONLY CHANGED BY AMENDMENT.

In the future the people of North Dakota may decide that this method of legislative revision is unwise, inexpedient, or overhasty. Speaking through their sovereign power under the Constitution, the people may prohibit this method of revision. With that side of the question, in this opinion, I have no concern and hence made no comment thereon. I merely state my conclusion as to the bald legal right to revise the Constitution by this method under our institutions as they exist today. As yet the people of North Dakota have not seen fit to prohibit this method of legislative revision. Hence, I am of the opinion that the method of revision proposed in House Bill No. 44 is legal.

If there is any doubt about the matter it is resolved in favor of the legality of the method proposed, by a principle of supreme and controlling

force, a principle which has been set out by Jameson, the great authority upon constitutional questions.

“But in practice, where doubt arises, and there is nothing to indicate decisively the intention of those who framed the instrument, perhaps the people, assuming to exercise power under one construction, rather than another, should be given the benefit of the doubt. It is questionable policy to attempt, by abstract rules of law in doubtful cases, to prevent or to control great organic movements of the people.” Jameson *Con. Con.*, page 603.

Respectfully,

D. V. BRENNAN,  
Assistant Attorney General.

Submitted with my full approval.

WILLIAM LANGER,  
Attorney General.

## 115. CALL FOR A CONSTITUTIONAL CONVENTION

The usual procedure in calling a constitutional convention is as follows: (1) The legislature passes a resolution submitting to the people the question as to whether a convention shall be held; (2) the governor proclaims the result of the popular vote upon this question; (3) if the vote is favorable, the legislature then passes an act providing for the election of the delegates and the assembling of the convention. These three steps may be illustrated by the following three documents respectively regarding the Illinois constitutional convention of 1920-22.

### a. Legislative Resolution of Submission

[*Laws of Illinois, 1917, p. 805.*]

Whereas, The provisions of the Constitution of this State are in many respects inadequate to the present and prospective needs of the people; and

Whereas, By its provisions it is not possible to submit to the people a proposition to amend more than one article of the Constitution at the same time; therefore, be it

*Resolved*, by the Senate, the House of Representatives concurring herein, That a convention is necessary to revise, alter or amend the Constitution of this State, and that the question of the calling of such convention shall be submitted to the electors of this State at the next general election, as provided for in article 14 of the present Constitution.

Adopted by the Senate January 24, 1917.

Concurred in by the House of Representatives March 14, 1917.

**b. Governor's Proclamation**

[*Proceedings of the Constitutional Convention, State of Illinois, 1920-1922*, vol. I, p. 5.]

Whereas, The Fiftieth General Assembly of the State of Illinois passed a Joint Resolution proposing the calling of a Constitutional Convention (which said resolution was adopted by the Senate by two-thirds vote, January 24, 1917, and concurred in by the House by two-thirds vote March 14, 1917), for the submission to the electors of this State for adoption or rejection at the next election of Members of the General Assembly of the State of Illinois, to be held on the fifth day of November, A. D. 1918, which said election was the next election for Members of the General Assembly ensuing the passage of said Joint Resolution;

And Whereas, The said proposition for calling of a Constitutional Convention was duly published in two newspapers at the seat of government at least three months before the holding of said election on the fifth day of November, A. D. 1918, and notice of said election for the submission of said proposition was given as the law provided;

And Whereas, The said proposition was submitted to the electors of the State, the ballots canvassed and returns made to the Secretary of State, all in conformity to law;

And Whereas, In pursuance of law, the State Officers appointed to canvass the returns of said election and to declare the result thereof, did, on the 25th day of November, A. D. 1918, and between that date and this, the 30th day of November, A. D. 1918, in my presence, proceed in pursuance to law to open and canvass the returns of the votes for the adoption or rejection of said proposition, and it appearing, as a result of the canvass of the votes given at the above named election for and against the adoption of the proposition for the calling of a Constitutional Convention, that the total number of men's votes cast at said election was 975,545; that the total number cast for the adoption of said proposition was 562,012; that the total number of votes cast against said proposition was 162,206; that a majority of all the men's votes cast at said election was cast in favor of the adoption of said proposition for the calling of a Constitutional Convention; the majority of the said Board of Canvassers having declared that the proposition aforesaid was adopted;

Now, Therefore, I, FRANK O. LOWDEN, Governor of the State of Illinois, in conformity to the statute in such case made and provided, do hereby make public proclamation declaring as the result of the canvass

aforesaid made by a majority of the said State Board of Canvassers that the proposition aforesaid was adopted by virtue of having received a majority of all the men's votes cast at said election, and that said proposition was adopted.

(SEAL)

In Testimony Whereof, I have hereto set my hand and caused to be affixed the Great Seal of State. Done at the Capitol in the City of Springfield, Illinois, this 30th day of November, A. D. 1918.

FRANK O. LOWDEN

*Governor of the State of Illinois.*

By the Governor:

LOUIS L. EMMERSON

*Secretary of State of the State of Illinois*

Filed November 30, 1918.

Louis L. Emmerson,  
*Secretary of State.*

### c. Legislative Convention Act

[*Laws of Illinois, 1919, pp. 60-63.*]

*An Act to assemble a convention to revise, alter or amend the Constitution of the State of Illinois.*

SECTION 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* That at the hour of 12 o'clock noon, on the sixth day of January, 1920, a convention to revise, alter or amend the Constitution of the State of Illinois shall meet in the hall of the Representatives of the General Assembly in the capitol building, in the City of Springfield. The Secretary of State shall take such steps as may be necessary to prepare the hall of the Representatives for the meeting of the convention.

SECTION 2. The convention shall consist of one hundred and two delegates. Two delegates shall be elected in and from each district entitled by law to elect a senator to the General Assembly. Delegates shall possess the same qualifications as State senators. The Governor, or the person exercising the powers of Governor, shall issue writs of election to fill vacancies in the convention.

SECTION 3. A primary election for the nomination of candidates for the position of delegate shall be held on the tenth day of September, 1919. All provisions of law in force at such time, and applying to the nomination of candidates for the office of State senator, shall to the



extent that they are not in conflict with the terms of this Act, apply to the primary election herein provided for.

Vacancies created by the death of, or the declination of the nomination by any person nominated as a candidate for the position of a delegate, shall be filled in the manner provided by law for the filling of similar vacancies occasioned by the death of, or declination of the nomination by any person nominated as a candidate for the office of State senator.

Independent nominations for the position of delegate may be made in the manner now provided by law for the nomination of independent candidates by petition.

SECTION 4. The delegates shall be chosen at an election to be held on the fourth day of November, 1919. Such election shall be conducted in conformity with the laws then in force relating to elections for State senators, to the extent that such laws are applicable.

All votes cast in the election for delegates shall be tabulated, returned and canvassed in the manner then provided by law for the tabulation, return and canvass of votes cast in elections for State senators.

The official or officials, charged with the duty of issuing certificates of election to persons elected to the office of State senator, shall issue certificates of election to all persons duly elected as delegates.

Election contests for membership in the convention shall be heard and determined by the convention.

SECTION 5. Each delegate before entering upon his duties as a member of the convention, shall take an oath to support the Constitutions of the United States and of the State of Illinois, and to discharge faithfully his duties as a member of the convention. In going to and returning from the convention and during the sessions thereof the delegates shall, in all cases, except treason, felony or breach of the peace, be privileged from arrest; and they shall not be questioned in any other place for any speech or debate in the convention.

SECTION 6. Each delegate shall receive for his services the sum of two thousand dollars, payable at any time after the convention is organized. The delegates shall be entitled to the same mileage as is paid to the members of the General Assembly, to be computed by the Auditor of Public Accounts. The delegates shall receive no other allowance or emoluments whatever, except the sum of fifty dollars to each delegate, which shall be in full for postage, stationery, newspapers, and all other incidental expenses and perquisites. The pay and mileage allowed to each delegate shall be certified to by the president of the convention and entered on the journal of the convention.

SECTION 7. The convention shall determine the rules of its procedure, shall be the judge of the election, returns, and qualifications of its members, and shall keep a journal of its proceedings.

The Governor shall call the convention to order at its opening session and shall preside over it until a temporary or permanent presiding officer shall have been chosen by the delegates.

The delegates shall elect one of their own number as president of the convention, and they shall have power to appoint a secretary and such employes as may be deemed necessary. The secretary shall receive a compensation of fifteen dollars (\$15.00) per day. The employes of the convention shall receive such compensation as shall be determined upon by the convention.

SECTION 8. The proceedings of the convention shall be filed in the office of the Secretary of State. The revision or alteration of, or the amendments to the Constitution, agreed to and adopted by the convention, shall be recorded in the office of the Secretary of State.

The revision or alteration of, or the amendments to the Constitution, adopted by the convention, shall be submitted to the electors of this State for ratification or rejection, at an election appointed by the convention for that purpose, not less than two months, nor more than six months after the adjournment of the convention. The convention shall determine the manner in which such revision, alteration or amendment shall be submitted to the electors. The convention shall prescribe the manner and form in which such revision, alteration or amendments shall be published prior to the submission thereof to the electors. No such revision, alteration or amendments shall take effect unless approved by a majority of the electors voting at such election.

The convention shall designate or fix the day or days upon which such revision, alteration or amendments, if adopted by the voters, shall become effective.

SECTION 9. Notices of the election to be called by the convention shall be given in the manner and form prescribed by the convention. The convention shall prescribe the manner and form of voting at such election, and the ballots for use in such election shall be printed accordingly, by the officials charged with the duty of printing ballots for use in general elections.

The votes cast at such election shall be tabulated, returned and canvassed in such manner as may be directed by the convention.

SECTION 10. Every person who, at the time of the holding of any primary or other election provided for in this Act, is a qualified elector

under the Constitution and laws of this State, shall be entitled to vote in such election.

The primary and other elections provided for in this Act shall be conducted by the officials, judges and clerks charged with the duty of conducting general elections.

All laws then in force in relation to the registration of voters in primary and general elections, and all laws then in force for the prevention of fraudulent and illegal voting, shall be applicable to the primary and other elections provided for in this Act.

All laws in force governing elections and not inconsistent with the provisions of this Act, or with powers exercised under the terms hereof, shall apply to and govern elections held under the terms of this Act.

SECTION 11. The convention shall have power to punish by imprisonment, any person, not a member, who shall be guilty of disrespect to the convention, by disorderly or contemptuous behavior in its presence. But no such imprisonment shall extend beyond twenty-four hours at any one time, unless such person shall persist in such disorderly or contemptuous behavior. Commitments for disorderly or contemptuous behavior in the presence of the convention shall be made in the manner now provided by law for the commitment of persons guilty of disrespect to the General Assembly.

SECTION 12. It shall be the duty of all public officers to furnish the convention with any and all statements, papers, books, records and public documents that the convention shall require. The convention, and its committees, shall have the same power to compel the attendance of witnesses, or the production of papers, books, records and public documents, as is now exercised by the General Assembly, and its committees, under the provisions of an Act entitled, "An Act to revise the law in relation to the General Assembly," approved and in force February 25, 1874.

SECTION 13. The sum of five hundred thousand dollars (\$500,000), or so much thereof as may be necessary, is hereby appropriated for the payment of salaries and other expenses properly incident to the constitutional convention. The Auditor of Public Accounts is hereby authorized and directed to draw warrants on the State Treasurer for the foregoing amount or any part thereof, upon the presentation of itemized vouchers certified to as correct by the president of the constitutional convention or the acting president of the convention. All printing, binding, stationery and other similar supplies for the constitutional convention shall be furnished through the Department of Public Works and Buildings.

Approved June 21, 1919.

## 116. ADDRESS OF SUBMISSION

When a constitutional convention completes its labors and is ready to submit to the people the draft of a new constitution, it usually accompanies such draft with an address to the people setting forth the reasons why, in the opinion of the convention, the proposed constitution should be adopted. The address accompanying the proposed Illinois Constitution of 1922 is given, in part, in the following selection.

*[Proposed New Constitution of Illinois, 1922, With Explanatory Notes and Address to the People, pp. 5-6, 19-20.]*

### ADDRESS TO THE PEOPLE OF THE STATE OF ILLINOIS

Adopted by the Constitutional Convention,  
September 12, 1922

To the People of Illinois:

Changed conditions and increasing knowledge demand from time to time adjustments in the mechanism of government.

In 1869 the people of this State, already dissatisfied with the Constitution adopted only twenty-one years earlier, elected a Convention to recommend a new Constitution. These men wrought well and in the following year their work was approved at the polls. For fifty-two years, under the Charter then adopted, Illinois has lived and prospered.

As new conditions and increased experience had before dictated change, so in 1918 the people, again persuaded that revision was required, voted for the calling of a Constitutional Convention and in the following year elected one hundred and two delegates charged with the duty of consulting together and of reporting back to those who had elected them. The men of this Convention came from every part of the State and from many different walks in life. On almost every important question there developed among them wide difference in opinions, opinions often tenaciously held and only reluctantly yielded. Now after many months of labor and many other months of recess, during which differences have lessened and heat has cooled, there has come practical unanimity among the delegates and they join in recommending to the people of Illinois a Constitution as it has been hammered out in their deliberations.

It is not to be pretended that the instrument is perfect, or even that it represents all the hopes and wishes of any one man or of any group of men. It is, as was the Federal Constitution and as all such measures must be, the result of compromise. No voter should approach its consideration with the mind to compare it with his ideal, for this is to con-

demn it in advance. Nor should it be an objection that some desired provision is not found within its pages, unless that provision is in the old instrument. The real and only question presented to the people of Illinois is: Is this proposed new Constitution, framed by your representatives, better than the Constitution under which you now live?

This question must be put and answered in view of the welfare of the whole State and all her population. So, too, it must be put and answered in the knowledge that a Constitution is not, and does not pretend to be, a statutory code. It is the function of a Constitution only to provide for the form of government, to define the powers and duties of the principal agencies of that government, and to put such limitations upon the powers of the government itself as experience has shown are necessary to the preservation of liberty. Under our system, the legislature has all power not denied to it or expressly given to other agencies and so to the legislature must be left the working out of the details of law. When the legislature makes a mistake, it can be speedily and easily remedied, while mistakes in the Constitution are much more difficult of cure. For these reasons the Convention has wisely confined itself to matters thought to be fundamental, and left to the General Assembly the wide and fruitful field of legislation. In weighing the merits of the Constitution now offered, these considerations should be borne in mind.

In order that the voters may intelligently answer the one question which must be answered by their ballots: "Does the proposed new Constitution, on the whole and in view of the needs of all of the people of the whole State, promise better governmental conditions than the present Constitution?" we who have worked these many months to improve our government, here set forth in brief the principal changes which will be effected and our reasons for believing that they are desirable.

. . . . .

## CONCLUSION

The highest and noblest political activity of a self-governing people is the adoption of a Constitution. History affords no nobler conception of government than that which contemplates self-respecting and intelligent human beings deliberately considering and voluntarily adopting rules which shall be binding upon themselves, and to which they shall first owe obedience.

The people of Illinois are now called upon for the first time in fifty-two years to enter upon this serious undertaking. The delegates to the Convention have constituted but a committee to consider the changes

that may to them seem desirable, and to recommend such changes to the ultimate sovereign, the people. With the people must rest the responsibility. We, of the Convention, have spent many months of patient labor upon this work. By the committees to which were first referred the proposals all citizens who desired to be heard were given opportunity to express their views. Infinite pains have been taken to ascertain the sentiments of the people of the State and like pains have been taken to express these sentiments in formal rules of law.

To our fellow citizens of the State of Illinois, by whom we were selected to perform the important task of formulating a Constitution, and to whom we have never failed to recognize our responsibility, we now submit the results of our labor, confident that the people in their wisdom will duly weigh the advantages of the offered Constitution as compared with that under which we now live and will by their ballots render a just and wise decision.

On December 12, 1922, the election will be held to determine whether our judgment of the welfare of the State shall be approved. On that date every man and woman who loves his or her State should glory to discharge the highest political duty of free men and free women and register their opinions at the polls.

Done in convention at the capitol in the city of Springfield on the twelfth day of September in the year of our Lord one thousand nine hundred twenty-two.

In witness whereof we have hereunto subscribed our names.

CHARLES E. WOODWARD  
President

Attest:

B. H. McCANN  
Secretary

## 117. THE CONSTITUTIONAL CONVENTION OF MASSACHUSETTS

One of the most important deliberative bodies which has met in recent years for the purpose of revising the fundamental law of a state was the Massachusetts constitutional convention of 1917-19. A good account of the work of that body follows.

[Lawrence B. Evans, "The Constitutional Convention of Massachusetts," *American Political Science Review*, Vol. XV, pp. 214-232 (May, 1921).]

The constitutional convention of Massachusetts which assembled in the city of Boston, June 6, 1917, and finally terminated its labors at a



short session of two days in August, 1919, is the fourth body of this kind which the Old Bay State has had. The first convention was held in 1779 and 1780 in Cambridge and Boston, and formulated the constitution of 1780. This instrument, to which sixty-six amendments have been added, is the oldest written constitution now in force anywhere in the world. The second convention was held in 1820, and submitted a series of resolutions part of which were adopted and part rejected by the people. A third convention met in 1853 all of whose proposals were rejected. After an interval of sixty-four years, a fourth convention was called, which met in 1917 and again in 1918 and yet again in 1919. It submitted to the people twenty-two amendments and a revised draft of the constitution, all of which were accepted.

The convention was composed of 320 delegates. Of these 16 were elected at large, 4 were elected by each congressional district, and the remaining 240 were elected from the districts created for the purpose of choosing members of the state house of representatives. They were elected without party designations, but before the election took place, the lines between the friends and the opponents of the initiative and referendum were rather sharply drawn, and this served practically all the purposes of party organization and designation. In fact, this question dominated the whole of the first session of the convention and overshadowed other questions which were probably of greater importance.

Three months before the convention assembled, the governor appointed a "Commission to compile Information and Data for the Use of the Constitutional Convention," to which were assigned offices in the state house, which were kept open throughout the first two sessions of the convention and where at least one member of the commission could always be found. In considering how it could be of most use to the convention, the commission reasoned that as the convention was made up of busy men who had neither the time nor in many cases the necessary training for undertaking extensive research, it would be most helpful to issue a series of bulletins, each dealing with a topic which was likely to come before the convention. To this end a circular letter was sent to all the men, about nine hundred in number, who had taken out nomination papers for election to the convention, asking them on what topics they would suggest that information be compiled. About one hundred different topics were mentioned, and on thirty-six of these, bulletins were prepared, of which an edition of five hundred copies was printed and a copy sent to each delegate as soon as issued. In order to achieve the largest usefulness, all of these bulletins should have been in the hands of the delegates before the convention assembled. The commission was

appointed too late to make this possible, and the best that it could do was to see that each bulletin was ready before the subject with which it dealt was reported upon by a committee of the convention.

In preparing its bulletins the commission sought to give them three characteristics. They must be concise, else they would not be read; they must be authoritative, so that the delegates could accept their statements of fact as established and safely base conclusions upon them; they must be impartial and free from attempts at propaganda. When this series of bulletins began to appear, few of the delegates paid much attention to them, but this attitude gradually changed, and upon at least one occasion the convention postponed its debate upon a certain topic until it had received the commission's bulletin which was then nearing completion.

The commission not only compiled information for the convention, but it was made an integral part of the convention's machinery. Its members frequently appeared before committees, it assisted the delegates in the drafting of amendments, and its vice-chairman was made an officer of the convention and served throughout as technical adviser to committees. The most important function of this office was to assist the committee on form and phraseology in the final revision of proposed amendments before they were sent to the people.

The convention was called to order by Governor McCall. This was peculiarly fitting, for he more than any other man is entitled to the credit for the enactment of the legislation which resulted in the holding of the convention. The delegates chose for their president Hon. John L. Bates, former governor of Massachusetts, and much of the success of the convention was due to his great ability as a presiding officer, to his fairness, and to the skill with which he helped the convention over many hard places.

The first session of the convention, which occupied the summer of 1917, was dominated by the question which had been uppermost in the public mind since the holding of a convention was first proposed, namely, whether Massachusetts should adopt some form of initiative and referendum. A measure covering the subject was introduced and held the center of the stage throughout the session of 1917, but was put aside from time to time to permit the consideration of other questions which it was deemed necessary to submit to the people at the November election. Three such measures were agreed upon by the convention and adopted by the people in November, 1917. Each of the fourteen counties returned a majority in favor of each amendment. . . .

When these three amendments had been submitted to the people, the convention resumed its discussion of the initiative and referendum, and

finally adopted a measure which provides for the initiation by the people of both constitutional amendments and of laws and also for a compulsory referendum on enactments of the legislature. The measure is too long for detailed description, but its distinguishing feature as compared with similar measures in other states may be said to be its exemptions. Neither the judiciary, nor judicial decisions, nor the anti-aid amendment, nor any of the great safeguards of liberty set forth in the bill of rights may be made the subject of an initiative petition. Having adopted this amendment by a vote of 163 to 125, and having provided that it should be submitted to the people at the state election of November, 1918, the convention adjourned until June, 1918.

When the convention reassembled, it should have felt stimulated by the endorsement implied in the overwhelming majorities by which the three amendments submitted had been ratified. The result however was otherwise. Although some of the questions discussed at the second session were not inferior in importance to those of the first session, it was noticeable that the interest of many of the delegates had materially flagged, and a considerable number paid little attention to the proceedings. Eighteen amendments were, however, approved by the convention, and at the election in November, 1918, they, as well as the amendment establishing the initiative and referendum—adopted too late for action in 1917—were ratified by the people. . . .

As already stated, the Massachusetts constitution of 1780 is the oldest written constitution now in force anywhere in the world. To keep it abreast with the needs of the state and with changing sentiment, sixty-six amendments have been adopted. As a result, it is often difficult to determine with precision what the requirements of the constitution are as to any given point. Hence, before adjournment on August 21, 1918, the convention provided for the appointment of a committee to prepare a revised draft of the constitution, striking out all obsolete matter, and inserting in the proper place each provision that was still in force. The chairman of the subcommittee which had active charge of this work was Hon. James M. Morton, retired justice of the supreme judicial court, whose wide experience and great learning and beneficent presence contributed so much to the work of the convention. Judge Morton prepared a revision (the Morton draft), the writer also prepared one (the Evans draft), and upon these two the committee formed a third draft, which was accepted by the convention at a short session in August, 1919, and was ratified by the people at the November election by a majority of more than 200,000. Unfortunately, in an effort to make sure that the revision had not altered the original sense of any provision of the consti-

tution, some one obtained the insertion of the following ill considered section:

"Art. 156. Upon the ratification and adoption by the people of this rearrangement of the existing constitution and the amendments thereto, the constitution shall be deemed and taken to be so rearranged and shall appear in such rearranged form in all future publications thereof. Such rearrangement shall not be deemed or taken to change the meaning or effect of any part of the constitution or its amendments as theretofore existing or operative."

When the supreme judicial court was asked to determine whether the new draft was now the constitution of the state or whether the old instrument with its sixty-six amendments was still in force, the court held that the paragraph above quoted indicated that the new draft was not intended to supplant the old constitution, which therefore still remained the fundamental law. At the ensuing session of the legislature Senator Loring, who had been chairman of the committee on form and phraseology of the convention, endeavored to persuade that body to submit the new draft, with the obnoxious article omitted, as a constitutional amendment, but the motion was rejected almost unanimously.

In order to form a just estimate of the work of the constitutional convention it is necessary to look not only at the measures which it adopted but also at those which it refused to adopt. It is impossible of course to enumerate all the constitutional provisions which it might have submitted to the people for their approval. These cover the whole range of government. Neither would it be profitable to consider the proposals, several hundred in number, which were unfavorably reported by committees and were never considered by the convention. But of the proposals for amendment which were before the convention and were extensively debated and finally rejected, three are of special importance, and as to these three, students of politics and government are practically unanimous in disagreeing with the judgment of the convention.

The first of these proposals authorized the legislature to classify property for purposes of taxation. The constitution of Massachusetts restricts the taxing power of the legislature, except as to taxes on incomes, to the levying of "proportional and reasonable" taxes. The supreme court has held repeatedly that the word "proportional" prevents the taxing of different kinds of property at different rates. All property must be taxed alike in proportion to its value. This rule may have been just and expedient in 1780, when the forms of property were less numerous and the economic organization of society less complex than at present, but it is contrary to the opinion which now prevails as to the

proper basis of a sound system of taxation. Massachusetts particularly requires the elasticity which the levying of taxes by classes permits, for there is no part of the country where property has been accumulated in forms more easily evasive of the tax gatherer or where economic interests are more intricate. Yet the convention refused to alter the ancient rule. If the gossip of the corridors can be relied upon, certain real estate interests in Boston were chiefly responsible for the defeat of the amendment.

On the subject of social insurance the convention again failed to act in accordance with prevailing opinion. Whatever one may think of the merits of old age pensions, health insurance, accident insurance and other forms of social amelioration, particularly as applied to the needs of his own community, there is general agreement that every state legislature ought to be vested with the power to enact legislation of this kind. Whether the power ought to be exercised is another question. Several amendments were drafted for the committee on social welfare, all of which were reported to the convention. Among these the convention chose for discussion the most comprehensive one, one which authorized the legislature to enact practically any form of social insurance which met with its approval. As this proposal was supported by those members of the committee who were regarded as ultra-conservative, an easy victory in the convention was predicted. But it was defeated, and strange to say, largely through the opposition of the labor delegates. It has been suggested that the amendment was unnecessary, inasmuch as the residuary power of the legislature is probably broad enough to cover legislation of this kind. This opinion is probably correct, but in the case of a matter of such extreme importance all doubt should be removed. Should Massachusetts adopt a system of old age pensions, for instance, the constitutionality of the legislation would undoubtedly be disputed, and the matter would be judicially tested. It is unfair to the courts to place upon them the burden of deciding, on purely legal considerations, a question which the people ought to decide for themselves. Much of the criticism of the courts for decisions in cases involving the validity of social legislation would be avoided if the people would remove from their constitutions the ambiguities which make judicial action necessary.

The third amendment which the convention rejected, but which all students of government will agree should have been adopted, made definite provision for the calling of a constitutional convention. The constitution of 1780 provided that in 1795 the question should be submitted to the people as to whether a convention should be held. If they should decide in the negative, as they did, no further provision was made

for resubmitting the question or for calling a convention in any other way. The convention of 1820 provided a method for amending the constitution through proposals initiated by the legislature, and it has been argued by some that the specific enumeration of this method excludes all others. A like situation exists in Rhode Island, and its supreme court has ruled in an advisory opinion that a constitutional convention cannot be held in that state. The supreme judicial court of Massachusetts has said, in an advisory opinion written by Chief Justice Shaw, that amendment on the initiative of the legislature is the only method of amendment authorized by the constitution of Massachusetts. Just what the court meant by this cryptic utterance is uncertain. If it meant that amendment through legislative action is the only method mentioned in the constitution, it stated an obvious fact. But if it meant that the mention of this method of amendment was sufficient in itself to remove from the residuary power of the legislature the authority to provide for a constitutional convention, many would dissent. Those who would apply in this situation the maxim *expressio unius exclusio alterius* fail to take into account the high nature of the residuary power of the legislature. It represents the whole political authority of the people. Subject only to the limitations of the federal and state constitutions, the power of the legislature embraces the whole range of political action. It is not to be presumed that it has been cut down unless the intention of the people is unmistakable. When the people of Massachusetts gave the legislature the power to initiate amendments, it did not take from it the power to adopt any other method of constitutional revision which it had previously had the power to adopt. Both reason and constitutional practice in Massachusetts clearly establish the power of the legislature to submit to the people the question of calling a convention. But the discussion of the subject establishes with equal clearness the wisdom of removing all doubt. Yet a resolution giving the legislature power to submit to a popular vote the question of calling a convention was rejected. The explanation is not clear. The resolution was acted upon late in the second session. The delegates were tired and it was difficult to attract their attention. The debate, particularly on the part of the opposition, was weak. The resolution was defeated perhaps as much by inertia as anything else, assisted by a feeling that the convention had already done enough.

Not the least interesting feature of the constitutional convention and its work is the action of the people upon the amendments submitted. At the election of 1917, three amendments were submitted, and the action of the people on them showed the popular referendum in its very



best light. All of these amendments were adopted by substantial majorities. Furthermore each of them received a majority of votes in each county in the state, and in no instance was the number of blank ballots as large as the number of ballots in favor of the amendment. Still more impressive was the fact that the total vote for and against each of these amendments was about 85 per cent of the total vote cast for the various candidates for governor. . . .

There was one undesirable practice on the part of some of the delegates to the convention which should be mentioned in order that future conventions both in Massachusetts and elsewhere may prevent it. That is the abuse by delegates of the privilege of revising the stenographic report of the speeches which they addressed to the convention. When the question of printing the debates was under discussion in the convention, it was pointed out that these debates would not only have value in the future as discussions of the subjects with which they dealt, but also that they would throw light upon the meaning of doubtful clauses in the constitution, and hence would be consulted not only by students of public affairs but by legislators and by the courts. It is obvious however that the printed debates lose their value as guide to the meaning of the constitution if they are not a true record of what was said in the convention. We are all familiar with the scandalous length to which Congress has gone in granting leave to print and the privilege of extending remarks. It is believed that the constitutional convention never granted to any delegate formal leave to print, but the same result was attained through the privilege accorded to each delegate of revising the stenographer's report of his speech. In at least one instance, one of the most prominent members of the convention revised his speech by substituting for it an entirely new one. The speech in the printed report was never delivered to the convention, and, as the debates were not printed until after the adjournment of the convention, there was no opportunity for the delegates to detect this falsification of the record. Obviously such a speech is of no value as a guide to the meaning of the provision under discussion, for since it was never delivered, its assertions could not be corrected nor its arguments refuted.

The constitutional convention of Massachusetts furnishes strong evidence of the change which has come over the view taken by the people of the functions of government. Whether their conclusion be a wise one or not, it is unquestionably true that the people of our day have rejected Jefferson's maxim that that government is best which governs least. Public opinion requires that the field of governmental activity shall be enlarged, and that our political machinery, whose function a

century ago seemed to be chiefly a protective and defensive one, shall now become the active agent for the conduct of enterprises which were formerly under private control. The wider the range of government becomes, the more necessary it is that its agents shall have large freedom of action. The carefully devised series of checks and balances to which John Adams paid eloquent tribute may easily result in deadlock. In accordance with the prevailing opinion of the time, most of the amendments submitted to the people of Massachusetts in 1917 and 1918 enlarged the sphere of the government and removed existing restrictions, while only a few of them imposed new restrictions. In this respect the convention of 1917-18 is in marked contrast with the earlier conventions in Massachusetts. The convention of 1820 submitted fourteen amendments to the people, only one of which involved any increase in the power of the legislature, while the convention of 1853 recommended no increase at all in the power of the legislature. Abuse of official authority is no longer the bugbear which it was to our grandfathers, or at any rate the people of our day are willing to incur the risk of such abuse in order to leave to their government freedom to act.

While the Massachusetts convention showed the prevailing opinion as to enlarging the sphere of government and removing restrictions on the action of governmental agents, it was essentially a conservative body. None of its recommendations was radical. It adopted the popular initiative and referendum, but surrounded it with many safeguards. It refused to make any substantial change in the judiciary. The substitution of biennial for annual elections was essentially a conservative measure. In fact, it may be said of all of the twenty-two amendments which it submitted to the people that they made only such changes as are to be expected in any enlightened and progressive community which endeavors to adapt itself to the demands of new conditions and to keep in touch with the expanding range of men's thoughts.

## CHAPTER XX

### THE LEGISLATURE: ORGANIZATION

#### 118. THE UNICAMERAL LEGISLATURE

For many years there has been agitation in various parts of the country in favor of setting up a one-house state legislature, in order to do away with the friction and rivalry between two houses and the lack of responsibility of the bicameral system. A proposed constitutional amendment embodying this plan was submitted to the voters of Oregon in 1912 and again in 1914, which, although rejected on both occasions, received a considerable vote in its favor. The solid ranks of bicameral state legislative bodies was finally broken when, on November 6, 1934, the voters of Nebraska adopted an amendment to the constitution of that state providing for a one-house legislature. The first session under the new plan was held in 1937.

##### a. Nebraska Unicameral Amendment

[Text in Senning, *The One-House Legislature* (New York, McGraw-Hill, 1937), Appendix A.]

That Section 1 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 1. Commencing with the regular session of the Legislature to be held in January, nineteen hundred and thirty-seven, the legislative authority of the state shall be vested in a Legislature consisting of one chamber. The people reserve for themselves, however, the power to propose laws, and amendments to the constitution, and to enact or reject the same at the polls, independent of the Legislature, and also reserve power at their own option to approve or reject at the polls any act, item, section, or part of any act passed by the Legislature. All authority vested by the constitution or laws of the state in the Senate, House of Representatives, or joint session thereof, in so far as applicable, shall be and hereby is vested in said Legislature of one chamber. All provisions in the constitution and laws of the state relating to the Legislature, the Senate, the House of Representatives, joint sessions of the Senate and House of Representatives, Senator, or member of the House of Representatives, shall, in so far as said provisions are applicable, apply to and mean said Legislature of one chamber hereby created and the members thereof. All references to Clerk of House of Representatives or Secre-

tary of Senate shall mean, when applicable, the Clerk of the Legislature of one chamber. All references to Speaker of the House of Representatives or temporary president of the Senate shall mean Speaker of the Legislature. Wherever any provision of the constitution requires submission of any matter to, or action by, the House of Representatives, the Senate, or joint session thereof, or the members of either body or both bodies, it shall after January first, nineteen hundred and thirty-seven, be construed to mean the Legislature herein provided for.

That Section 5 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 5. At the regular session of the Legislature held in the year nineteen hundred and thirty-five the Legislature shall by law determine the number of members to be elected and divide the state in Legislative Districts. In the creation of such Districts, any county that contains population sufficient to entitle it to two or more members of the Legislature shall be divided into separate and distinct Legislative Districts, as nearly equal in population as may be and composed of contiguous and compact territory. After the creation of such districts, beginning in nineteen hundred and thirty-six and every two years thereafter, one member of the Legislature shall be elected from each such District. The basis of apportionment shall be the population excluding aliens, as shown by next preceding federal census. In like manner, when necessary to a correction of inequalities in the population of such districts, the state may be redistricted from time to time, but no oftener than once in ten years.

That Section 6 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 6. The Legislature shall consist of not more than fifty members and not less than thirty members. The sessions of the Legislature shall be biennial except as otherwise provided by this constitution or as may be otherwise provided by law.

That Section 7 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 7. Members of the Legislature shall be elected for a term of two years beginning at noon on the first Tuesday in January in the year next ensuing the general election at which they were elected. Each member shall be nominated and elected in a non-partisan manner and without any indication on the ballot that he is affiliated with or endorsed by any political party or organization. The aggregate salaries of all the members shall be \$37,500 per annum, divided equally among the members and payable in such manner and at such times as shall be provided

by law. In addition to his salary, each member shall receive an amount equal to his actual expenses in traveling by the most usual route once to and returning from each regular or special session of the Legislature. Members of the Legislature shall receive no pay nor perquisites other than said salary and expenses, and employees of the Legislature shall receive no compensation other than their salary or per diem.

That Section 10 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 10. The Legislature shall meet in regular session at 12:00 o'clock (noon) on the first Tuesday in January in the year next ensuing the election of the members thereof. The Lieutenant Governor shall preside, but shall vote only when the Legislature is equally divided. A majority of the members elected to the Legislature shall constitute a quorum; the Legislature shall determine the rules of its proceedings and be the judge of the election returns, and qualifications of its members, shall choose its own officers, including a Speaker to preside when the Lieutenant Governor shall be absent, incapacitated, or shall act as Governor. No member shall be expelled except by a vote of two-thirds of all members elected to the Legislature, and no member shall be twice expelled for the same offense. The Legislature may punish by imprisonment any person not a member thereof who shall be guilty of disrespect to the Legislature by disorderly or contemptuous behavior in its presence, but no such imprisonment shall extend beyond twenty-four hours at one time, unless the person shall persist in such disorderly or contemptuous behavior.

That Section 11 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 11. The Legislature shall keep a journal of its proceedings and publish them (except such parts as may require secrecy) and the yeas and nays of the members on any question, shall at the desire of any one of them be entered on the journal. All votes shall be viva voce. The doors of the Legislature and of the Committees of the Whole, shall be open, unless when the business shall be such as ought to be kept secret.

That Section 14 of Article III of the Constitution of Nebraska be amended to read as follows:

SEC. 14. Every bill and resolution shall be read by title when introduced, and a printed copy thereof provided for the use of each member, and the bill and all amendments thereto shall be printed and read at large before the vote is taken upon its final passage. No such vote upon the final passage of any bill shall be taken, however, until five legislative days after its introduction nor until it has been on file for final reading and

passage for at least one legislative day. No bill shall contain more than one subject, and the same shall be clearly expressed in the title. And no law shall be amended unless the new act contain the section or sections as amended and the section or sections so amended shall be repealed. The Lieutenant Governor, or the Speaker if acting as presiding officer, shall sign, in the presence of the Legislature while the same is in session and capable of transacting business, all bills and resolutions passed by the legislature.

That Sections 12 and 28, of Article III, and Sections 9 and 17, of Article IV, be and the same hereby are repealed, effective as of January 1, 1937.

#### **b. Argument of Senator Norris**

[George W. Norris, "The One-House Legislature," *National Municipal Review*, vol. XXIV, pp. 87-99 (Feb., 1935).]

The question arises at once: Why should we have two branches in a legislature?

We elect the members of both branches from the same classes of people; their qualifications are exactly the same; their official duties and jurisdiction are exactly the same. Why do we not apply the same principle in other lines of government or of business? Why do we not have two boards of directors for our banks? Why not have two sets of county commissioners to govern our counties? Why do we not have two boards of aldermen in our municipalities? In other words, why do we adhere to the two-branch legislature, and yet reject the principle in every other line of government and of business? . . .

While our forefathers fought to overthrow the rule of Great Britain, yet, in the establishment of a new government, they followed the mother country. The legislatures of our colonies and of our states, as well as our federal government, were to a great extent copied after Great Britain. In those days England had a two-branch legislature, the House of Commons, elected by the people and representing the people, and the House of Lords, appointed for life by the King and representing the sovereign. The members of these two houses came from different classes; they represented different interests; their tenure of office was entirely different. Neither house could pass any law without the approval of the other; they constituted a check upon each other. Under conditions then existing in England, where the different branches of the legislature represented different classes and were selected in different ways, there was some reason for two houses, but in this country we have but one class



and both branches of our legislature represent the same class. There is no excuse whatever for a double-branch legislature.

Opponents of the one-house legislature in our states always claim that two houses are necessary so that one may check upon the other, but when both branches have the same qualifications, are selected by the same people, and have the same jurisdiction, there is no reason or excuse for this checking process. At the close of every legislative session, in every state in the Union, after these checks and balances are posted, it will be found that the politicians have the checks, and the special interests have the balance.

We think we have two branches to our legislatures, but, as a matter of fact, we have three. There is no such thing as a two-branch legislature, without the third branch coming into the picture. This third branch is the conference committee, and it is the most powerful of the three. A bill must pass through both branches, usually called the senate and the house of representatives, in exactly the same form, word for word, before it can become a law. In cases where the senate and the house disagree upon the wording of any bill, the bill is sent to the third house—the conference committee. This conference committee, composed as a rule of three members from the house and three members from the senate, usually meets in secret. No record is kept of its proceedings. There is no roll call vote. Practically all important bills get into the conference committee, and, unless the conference committee reaches an agreement, the bill is dead.

There is another thing about this conference committee which people do not understand. It is not an ordinary committee: It does not take up a bill and vote upon disagreements as the ordinary committee would do, and let the majority decide. Instead, the three members from the house control the house vote, and the three members from the senate control the senate vote, and the senate vote and the house vote must be exactly the same. If two of the three members of the conference committee from the senate do not agree, then, by the controlling of the senate vote, they have prevented an agreement of the conference committee. The same rule applies to the members of the conference committee from the house.

Thus, we see that in vital legislation, in which the people are deeply interested, laws are defeated in secret, without a record vote, and without a roll call vote, by two members of this powerful third house. It often occurs that these two members lay down certain conditions. In order to get any report, these conditions must be agreed to by the other members of the committee, and unless these conditions are agreed to, the

bill is dead. In this way, all kinds of jokers get into our laws, and the people are not able to place the responsibility upon the shoulders of those who are responsible for these jokers.

If an agreement is reached in this third house, the bill is reported to the senate and the house. Then the members of the senate and the members of the house must accept the conference bill without a single change or amendment, or it is defeated and must go back to the conference committee, where it will either be killed for good, or other undesirable conditions attached, in order to get any law whatever.

These conditions exist in every legislature in the world composed of two branches. Members of the senate and the house, therefore, when they are compelled to vote upon the adoption of a conference report, must take it as it is or let it alone. They must vote it up or vote it down. They must accept the bad, in order to get the good, or they must reject the good, in order to reject the evil. In a one-house legislature, none of these things can happen, for the very good reason that there is no such thing as a conference committee. There is no such thing as shifting the responsibility from one house to the other or to this third house, known as the conference committee.

One of the necessary things in an efficient state legislature is that it should be impossible under any circumstances or conditions to shift responsibility. The one-house legislature makes it impossible to do this. The two-house legislature offers all sorts of avenues by which the votes of its members can be covered up and by which the parliamentary situation can be so managed that it is practically impossible for an ordinary person to follow a bill through the maze of parliamentary situations through which such a bill must travel, as it goes through the house, through the senate, through the conference committee, and back again to the house and the senate.

A one-house legislature simplifies this. It is not necessary for the ordinary person to become an expert parliamentarian in order to know just what the record of his member and every other member of the legislature is. The constitutional amendment providing for a one-house legislature should provide that any one member could demand a roll call vote upon any motion that might be pending. This would make it impossible for responsibility to be shifted. The record of every member would be in the pitiless light of publicity, where even the headlines of the newspapers would plainly convey to the reader the record of the state's public officials.

If it is made impossible for any member of the legislature to shift responsibility or to cover up his vote in any way, and if he is compelled on

all occasions to cast his vote upon every proposed amendment and upon every bill without any possibility of concealing it, you have at one step brought about a reform in legislation which will make it impossible for the unworthy legislator to cover up his tracks, and will likewise make it possible for the loyal public servant to have his record known by all his constituents. It is just as important, if we are to have good government, to reward the public servants who are true, as it is to punish those who are untrue.

Another evil which a one-house legislature will bring to an end is the abolishment to a very great extent of the corrupt lobby which always swarms about the session of every state legislature. The professional lobbyist is able to ply his trade because, through the many opportunities offered by the two-house legislature and the conference committee, he is able to get the parliamentary situation in such shape that it cannot be understood by the people, and, in this way, responsibility is shifted from one house to the other, and from both houses to the conference committee, and there, particularly, the professional lobbyist gets in his work.

He can control this conference committee, if he is able to control two members of the conference committee from the house. Or, if he is not able to do that, then he can accomplish the same end by the control of two members of the conference committee from the senate. If he succeeds in killing legislation there, or if he is able to get jokers put into the bill, the people are unable to fix responsibility, and cannot act intelligently in future elections, in voting either for or against any member of the legislature who is a candidate for reelection.

The members of every one-house legislature should be elected on a non-partisan ballot. One of the evils of the state legislature is that we elect its members on a false issue. The issues dividing the great parties are national issues. The issues involved in the election of a state legislature are never national issues. When a man is elected to the state legislature because he bears the label of a party founded on a national issue, he thus rides into office when his constituents know little or nothing about where he stands on matters that will come before the state legislature. Members of the state legislature should be elected on state issues, and national issues should have nothing whatever to do with the question. Therefore, they should not be elected upon any party ticket or because they give adherence to some particular political party founded upon questions of national import.

## 119. LEGISLATIVE REAPPORTIONMENT

In order to take account of variations in the growth of population in different parts of the state, the constitutions generally provide that representation in the legislature shall be periodically reapportioned by the legislature itself. The legislature, however, sometimes fails to carry out the constitutional mandate, as has happened in Illinois. Two unsuccessful attempts have been made in that state to remedy this situation; first, by a provision in the proposed constitution of 1922, and, secondly, through judicial action in 1926.

### a. Plan for Reapportionment in Illinois

[*Proposed Constitution of 1922*, sec. 24.]

If the general assembly fails to make any such apportionment, it shall be the duty of the secretary of state, the attorney general, and the auditor of public accounts to meet at the office of the governor within ninety days after the adjournment of the regular session of the year designated for that purpose and make an apportionment as provided in this constitution.

### b. Power to Compel Reapportionment

[*Fergus v. Marks* (1926), 321 Ill. 510, 513.]

Original petition for mandamus to compel the legislature to meet and apportion the state in accordance with the Constitution.

. . . . .

It is apparent that the duty the performance of which is sought to be compelled is clear and unmistakable, so the only question to be determined is whether or not, on legal principles, the writ of mandamus can be issued directed to the members of the General Assembly in their official capacity.

The duty to reapportion the state is a specific legislative duty imposed by the Constitution solely upon the legislative department of the state, and it, alone, is responsible to the people for a failure to perform that duty.

The judicial department of the state cannot compel by mandamus the legislative department to perform any duty imposed upon it by law.

The constitutional provisions are commands of the people to the legislature, but they cannot be enforced by the court.

Writ denied.

## 120. MINORITY REPRESENTATION IN ILLINOIS

In order to prevent sectionalism and to secure representation of minorities in the lower house of the Illinois legislature, the following provision was inserted in the Constitution of that state adopted in 1870. It has accomplished the purpose for which it was originally intended, but has been accompanied by unfortunate results which probably render its further retention in the Constitution unwise.

[*Constitution of Illinois*, Art. IV, secs. 7 and 8.]

The House of Representatives shall consist of three times the number of the members of the Senate, and the term of office shall be two years. Three Representatives shall be elected in each Senatorial district at the general election in the year of our Lord 1872, and every two years thereafter. In all elections of Representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are Representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected.

## 121. THE SPLIT SESSION IN CALIFORNIA

The bifurcated session is a device intended to enable the legislature to perform its work more efficiently as well as to induce the people to take a greater interest in, and to exercise a larger control over, the work of legislation. The operation of this device, as found in California, is well described in the following selection.

[V. J. West, in *National Municipal Review*, vol. XII, pp. 372-373 (July, 1923).]

. . . The amendment adopted in 1911 [which] provides that a session of the legislature, except an extraordinary session, must at the expiration of thirty days after its commencement take a recess for not less than thirty days. Upon reassembling after the recess the legislature may remain in session as long as it sees fit, but an attempt is made to discourage the introduction of new bills.

This so-called "bifurcated session" was advocated by those who proposed it for four purposes. It was argued that, after a thirty-day session during which all the bills which were likely to be considered had been introduced, a thirty-day recess would be useful in giving the members time to consider and digest these measures and reach some conclusions as to their merits. It would also give the public a chance to get acquainted with the problems facing the legislature and to advise the members so that there might be some chance of a nearer approach be-

tween public opinion and legislative action. In the third place it was expected that the legislature might use the thirty-day recess for the purpose of conducting investigations either into the conduct of administrative branches of government or upon such public questions as were most pressing at the time. Finally it was expected that the provision for a recess would prevent the introduction of measures late in the session when they might be rushed through without adequate consideration.

These expectations with respect to the divided session have generally been realized, though not all members use the recess for the purpose intended, nor does the public generally take enough interest in the work of the legislature to inform itself. Nevertheless the recess has been found very useful by chairmen of committees in affording them time for the analysis of bills and in the preparation of committee reports; and the fact that the clerical staff of the legislature is kept busy during the recess in publishing and mailing thousands of copies of bills is indicative of some interest on the part of the public. During the session of 1921 the one month's recess was taken up with a debate over the proposed revision in the tax law which engaged the attention of the citizens from one end of the state to the other. It is not too much to say that this delay afforded the proponents of the measure an opportunity for securing a very wide discussion without which they would have had no chance whatever of securing its passage. It is quite possible that in every session there will be at least one measure of such transcendent importance that a thoroughgoing discussion will be highly desirable if not absolutely necessary. For that reason if for no other the thirty-day recess ought to be continued. Perhaps an equally important advantage will be the opportunity which the recess offers for carrying on legislative investigations. So far not a great deal of experience is available to judge of its significance from this point of view. During the session of 1923 several special committees conducted investigations on a variety of subjects. Most significant of these were the inquiries into the expenditure of money in election campaigns.

With the adoption of a new budget procedure it is possible that the bifurcated session will find another use. The governor is now required to submit the budget within the first thirty days. If he should introduce it at the beginning of the session, the first month may be taken up with the consideration of his proposals. It is possible that the budget might be disposed of before the recess, thus leaving the recess and the following session to take care of the work of legislation proper. This would be



particularly useful if it turned out that the budget required changes in the tax system. The appropriations having been settled first, the exact kind of tax could be determined upon after an investigation to be undertaken during the recess period.

Doubtless other uses for the recess period will be developed. At any rate the more important members of the legislature, those who take their responsibilities seriously, do not look with favor upon any measures to re-establish the continuous session.

## CHAPTER XXI

### THE LEGISLATURE: WORK AND METHODS

#### 122. CONSTITUTIONAL LIMITATIONS ON SPECIAL LEGISLATION

In order to overcome the evils of special legislation, many state constitutions not only prohibit the legislature from passing special laws in cases where a general law can be made applicable, but also contain a lengthy list of subjects upon which no special law shall be passed. The following section from the Constitution of Illinois will give an idea of the general character of such provisions.

[*Constitution of Illinois*, Art. IV, sec. 22.]

SECTION 22. The General Assembly shall not pass local or special laws in any of the following enumerated cases, that is to say: for—

- Granting divorces;
- Changing the names of persons or places;
- Laying out, opening, altering and working roads or highways;
- Vacating roads, town plats, streets, alleys and public grounds;
- Locating or changing county seats;
- Regulating county and township affairs;
- Regulating the practice in courts of justice;
- Regulating the jurisdiction and duties of justices of the peace, police magistrates and constables;
- Providing for changes of venue in civil and criminal cases;
- Incorporating cities, towns or villages, or changing or amending the charter of any town, city or village;
- Providing for the election of members of the board of supervisors in townships, incorporated towns or cities;
- Summoning and impaneling grand or petit juries;
- Providing for the management of common schools;
- Regulating the rate of interest on money;
- The opening and conducting of any election, or designating the place of voting;
- The sale or mortgage of real estate belonging to minors or others under disability;
- The protection of game or fish;
- Chartering or licensing ferries or toll bridges;

Remitting fines, penalties, or forfeitures;

Creating, increasing or decreasing fees, percentage or allowances of public officers, during the term for which said officers are elected or appointed;

Changing the law of descent;

Granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose;

Granting to any corporation, association or individual any special or exclusive privilege, immunity, or franchise whatever.

In all other cases where a general law can be made applicable, no special law shall be enacted.

### 123. LEGISLATIVE PROCEDURE IN MASSACHUSETTS

Although the Massachusetts legislature or general court, as it is called, is a conspicuous sinner in the matter of special legislation, it has certain outstanding methods of general procedure, such as public hearings on bills and the joint committee system, which make it well worthy of imitation by other states.

[A. C. Hanford, in *National Municipal Review*, vol. XIII, pp. 40-46 (Jan., 1924).]

What are the reasons for the relative success which the Massachusetts legislature has achieved? The answer to this question is to be found in the absence of any limitation upon the length of the session; the joint committee system; the custom that every proposed bill should be given a public hearing before a committee; the rule in regard to the date for introducing measures; the rules requiring not only that all measures be reported out of committee but that such reports shall be made before a certain date; the absence of committees highly privileged under the rules; the leadership of the speaker and president of the senate; the governor's influence upon legislation; the recent budget system; the wide use of unpaid special commissions to investigate and report on proposed legislation of importance; and the central location of the state capital.

All of the standing committees except those on ways and means, judiciary and the procedural committees on rules, engrossed bills, bills in the third reading and the house committees on elections and pay roll are joint committees. For certain purposes the separate committees on rules meet jointly, the committees on judiciary almost always meet jointly, and since 1920 by special arrangement the house and senate committees on ways and means have held joint sessions on the budget so that practically all the work is by joint committees. The committees consist usually of three or four members from the senate and eight or eleven

from the house and a senator is always chairman. A member from the house is selected as clerk of the committee thus eliminating the expense and political abuse involved in employing paid secretaries for such work. This method of providing for committee clerks has also been highly satisfactory from the point of view of efficiency because there is an incentive on the part of the clerk to handle the affairs of his committee in a thorough and business-like manner in order to obtain important committee appointments and possibly a chairmanship in the future.

After consideration by a joint committee bills are reported to either branch, except money bills which are always reported to the lower house, an attempt being made to secure an equal distribution of business between the two houses. If passed the bill goes directly on the calendar of the other house without a second committee stage. The joint committee system saves time and effort on the part of the members of the legislature and also that of the citizens who oppose or favor a measure; it makes possible a more careful and thorough consideration of measures; gives the less experienced members of the house the benefit of the advice and suggestions from the older members of the senate; avoids shifting of responsibility and tends to reduce friction between the houses thus securing some of the advantages of a unicameral system without any of its defects. In other states there seems to be a somewhat fanciful objection to the joint committee system on the ground that the larger number of representatives could outvote the senators and that trouble would arise over assigning the chairmanship to a senator, but in Massachusetts this has caused no difficulty and there is not a trace of friction.

There are at present thirty joint committees. Each senator is on three or four such committees and if he belongs to the majority party, is generally the chairman of at least one. Each representative usually serves on one or two committees and there is a rule that no member shall be required to be chairman of more than one. As in all legislative bodies certain committees such as those on ways and means, judiciary, cities, etc., are the most heavily burdened but there is a fairly equitable distribution of business among the other committees, only about nine of which received in 1923 less than twenty-five bills. While there are perhaps a few more committees than necessary the multiplicity existing in many states is avoided; members do not find their efforts divided among six to nine different committees as in some other legislative bodies and practically all of the committees are integral parts of the legislative system carrying a fair amount of business.

None of the committees is especially privileged in regard to the control of debate or in the reporting of bills referred to it. The committee on

rules in each branch is, however, a rather powerful body. The presiding officer of each house is chairman of his respective committee and the majority floor leader as well as the leading members of the house and senate have seats thereon. To this committee are referred all measures that are introduced after the date set for the filing of bills and the committee reports to its respective house whether or not the rule shall be suspended to allow introduction. Other matters such as orders authorizing committees to travel or to employ stenographers or involving special investigations go to this committee for report. The committees on ways and means and judiciary also have rather large influence due to their importance and because of the fact that they contain among their membership the leaders of the majority party. But these committees do not derive their prestige from rules which give them control over debate or permit them to change the regular order of business.

Custom requires that every bill no matter how trivial or unimportant should be given a public hearing before a committee, the date of which is publicly advertised, through the newspapers and by official bulletins. Oftentimes it is necessary to give more than one hearing on a measure and in fact the more important hearings may extend over several days. The committee hearings are for the most part conducted in an orderly fashion with ample opportunity to both the opponents and proponents to present their arguments. Hearings on measures of importance to the general public or to a large group of citizens are well attended and the proceedings are fully reported by the press of metropolitan Boston. The writer has seen as many as five or six hundred persons at a committee hearing on some important bill, such as proposals for repealing the daylight saving law, increasing the fees on motor vehicles, prohibition enforcement, granting equal pay to men and women teachers, etc. This system produces results that are highly satisfactory. It gives interested parties an opportunity to express their opinions and air their grievances. At the same time the members obtain valuable information on proposed legislation and are able to gauge the extent of popular demand for measures submitted for their consideration, while the general public is educated through the newspaper accounts. The successful working of this system is undoubtedly due in large measure to the location of the capitol at Boston in the center of a metropolitan area containing about half the population of the state and within easy reach of three-quarters of the people of the commonwealth. Although considerable publicity is given to the hearings, especially the important ones, through the newspapers, it is unfortunate that the committees do not keep official records of such hearings nor of their executive sessions which are accessible to the public.

Committees not only grant a public hearing on each measure but the joint rules require that every bill shall be reported to the whole house on or before the second Wednesday in March which may be and usually is extended to the second Wednesday in April. Upon the expiration of this period all measures in possession of a committee must be reported within three days. This report must recommend that such bills be referred to the "next General Court," which means that the measure goes over to the next session when it may be taken from the files by any member. This report is used in cases where the committee is unable or does not wish to reach agreement. But at this stage any member may move that the original bill be substituted for the report "reference to the next General Court" and if such a motion receives the required majority the measure is brought before the whole house. Every measure must, therefore, be reported by the committee to which it has been referred prior to the last month or two of the session either favorably, adversely, or by "reference to the next General Court." Committees are thus kept from pigeonholing measures in such a manner that they never see the light of day, while the rule requiring report before a certain date avoids the last-minute rush which is common in many legislative bodies at the close of the session. The rule requiring a report on all measures of course lengthens the sessions, but it has the advantage of getting all business before the legislature in time to dispose of it in an orderly fashion.

Measures reported out of committee go on the calendar of either branch, except money bills which are reported to the house, and are taken up in a specified order which cannot be set aside except by unanimous consent or a special majority and which must be completed as noted above before the expiration of the session. It is the practice of the present speaker to lay before the members of the house each week information showing the number of bills referred to each committee, the number reported by each to date, and the number still in committee as compared with the status at the same period in previous years. Recently this data has appeared weekly in the house journal. This practice keeps the members informed as to the progress of legislation and has been responsible for producing competition among the committees to finish their work as speedily as possible. Another helpful feature is the weekly publication of a "Bulletin of Committee Work and Business," which shows the committee to which each measure has been referred, the date set for hearings, the committee report, the action by each branch, and the action of the governor. This bulletin is not only furnished to the legislators but is issued for general distribution. In this



way the members of the legislature and the public are furnished with accurate, carefully arranged and easily understandable information concerning the status of any measure. A daily list is also published showing the committee hearings each day as well as a calendar for each house setting forth the business which will come before it during the day.

The procedure is thus arranged in such a manner as to make possible a careful consideration of every measure by a joint committee; to provide for ample publicity; the reporting of all bills to at least one house which then go through a regular order which cannot be changed except by a special majority, and the forcing of legislation step by step. Such a procedure, of course, makes it necessary for the legislature to remain in session from five to six months each year which has certain disadvantages as well as merits. It is clear, therefore, that the Massachusetts system is not adapted to states where the session is definitely limited in the constitution.

Besides the unlimited duration of the session, and the rules of procedure, there is another requirement which assists the legislature in conducting its business in an orderly fashion. The rules provide that practically all proposals for legislation must be introduced on or before the second Saturday of the session. Petitions or bills coming in after that time go to the "next General Court" unless the rule is suspended by a four-fifths vote of each branch. The only exceptions to this rule are reports from the state departments, commissions or special committees appointed to investigate various matters or legislation based upon recommendations in the governor's message, which may be introduced at any time. As a matter of fact the rule is suspended when such action is regarded as desirable, but it has a very decided advantage in that, with these exceptions, measures do not come straggling in all during the sessions; the leaders and committees know early in the session what is before them and can plan accordingly. In 1922 and in 1923 the work of the legislature was still further assisted by a requirement that state officers, heads of departments, and also certain commissions which were authorized to make investigations during the recess should file copies of their proposed bills early in December, the month before the legislature convenes. The present speaker has recently sent requests to members of the legislature urging them to submit as many of their proposed bills as possible prior to the opening of the 1924 session. An attempt is thus being made to get bills filed even prior to the date fixed by the rules, so as to have them printed and distributed in order that the committees may commence work at once instead of marking time for several weeks.

At the present time the legislature consists of 160 Republicans and 80

Democrats in the house and 33 Republicans and 7 Democrats in the senate, thus giving the Republican party a large majority in both branches although a somewhat smaller majority than in 1921 and 1922, when the Democrats had only five members in the senate and about 50 in the house. Partisanship, however, plays a small part in the legislature and an examination of the journal for the last few sessions fails to show a single instance of a strict party alignment on any measure. Also the legislature is not under the domination of the state organization of either party. As expressed by a competent observer and one who was for a long time a member of that body: "It especially resents anything savoring of dictation by party leaders outside the chamber. Few things would more hurt the chances of a bill than to let it be known that it was urged by the state committee of the majority party." At the same time there is most effective and able leadership among the majority party in both houses and the Republican party assumes credit if not responsibility for the showing of the legislature.

The principal leaders of the house are the speaker, the floor leader who serves on the rules committee, the chairman of the committee on ways and means, the chairman of the committee on judiciary, and a half-dozen others who gain prominence because of their ability and personality. The floor leader is placed in front of the speaker so that he may be promptly recognized by him, while the chairmen of the committees on ways and means and judiciary have especially assigned seats. In the senate, with only forty members, there has not been the same need for highly developed leadership, but the president of that body and the floor leader have been largely responsible for the direction of legislation. The leadership of these officers has been effective and the positions have been held by men of unusual ability and with a broad interest in improving the substance of legislation and legislative procedure. The list includes within recent years such names as President Coolidge, who was at one time president of the senate; the present governor, Channing Cox, who served first as chairman of the judiciary committee and later as speaker; Louis A. Frothingham, now a member of Congress, and author of *The Constitution and Government of Massachusetts*, and the present speaker, Benjamin Loring Young, who has taken a large part in the establishment of the budget system, in the new plan for continuous consolidation of the laws, in bringing about various changes in the rules strengthening legislative procedure, and who has made a scientific study and taken a keen interest in the general improvement of legislative methods and output.

The positions of president of the senate and speaker are eagerly sought for not only as places of power and honor but also because they are re-

garded as stepping-stones to the office of lieutenant governor, who by tradition has a strong claim on his party's nomination for the governorship. It is perhaps this factor that has furnished the incentive to leadership in the Massachusetts legislature. A presiding officer, a floor leader, or the head of an important committee, if ambitious, knows that his future depends upon his record in the chair and upon the manner in which he conducts his work. As long as a presiding officer cares to serve it is the custom to reelect him but, when a vacancy occurs by retirement or resignation, a brisk contest usually takes place. The various candidates then carry on a campaign after the close of the session prior to the primary and final elections in an attempt to pledge as many of the members or prospective members as possible. If one of the candidates has an extremely strong following the other may retire, but if this is not the case the fight is carried into the party caucus which is called two or three days before the meeting of the legislature.

The chief weakness of the Massachusetts legislative system is the mass of local and special legislation. About half of the actual output of the legislature, and even a larger proportion of the bills introduced, consists of special and local measures authorizing cities and towns to borrow beyond their debt limits; granting pensions to specified local employees; changing the names of city officers; creating public utility, charitable, and educational corporations; regulating the location of garages in a particular city; authorizing a specified charitable society to acquire property; authorizing a particular city to sell or lease certain land held by it for playground purposes; authorizing the registration of Mary Jones as a chiropodist without examination, etc. Then, too, there are numerous measures regulating the details of administration which should fall within the jurisdiction of some department or commission. . . .

This means that a large part of the time of the legislature is taken up with proposals of purely local significance and with details of an administrative nature at the expense of measures of state-wide interest and large importance. The legislature has attempted to reduce the burden somewhat through the introduction of a budget system, the requirement that all local measures be advertised in the locality affected, and the requirement that petitions for pensions must come from the proper local officials rather than from individuals. Yet the bulk of special legislation is still too great. The remedy would seem to be not in a constitutional prohibition of special legislation but in the adoption of a careful home-rule system for cities and the development of administrative machinery for passing upon requests for special and local legislation.

## 124. THE LOBBY

A sinister influence in legislation is the lobby or so-called "third house," consisting of persons employed by special interests to push or kill pending bills. Constitutional provisions, laws, and legislative rules have been adopted in various states in the endeavor to curb this evil, but without a large measure of success. In some cases they undertake to penalize lobbying as a crime, while, in others, publicity is relied upon as the principal means of enforcement. It must not be forgotten that certain kinds of lobbying may be quite legitimate and above-board. It is difficult to define lobbying in a criminal statute so as to exclude legitimate activities. In the first of the following extracts a survey is given of the provisions of existing state laws on the subject, together with some information as to how these laws actually operate in certain typical states. The second selection consists of portions of the Wisconsin anti-lobbying law, which is generally considered to be one of the most successful in this field.

## a. Regulation of Lobbying

[J. K. Pollock, Jr., in *American Political Science Review*, vol. XXI, pp. 336-341 (May, 1927).]

. . . . .

In the last decade, there has been an amazing development of the practice of employing legislative agents to represent special interests during the sessions of legislative bodies. This development has gone on so rapidly that today it is clear to experienced observers that the influence of these organized and well-represented groups is very potent in determining legislation, and in many cases it is even overwhelming and decisive. One writer refers to the lobbyists in Washington as "the third house of Congress." Other observers describe the swarm of lobbyists who attend the sessions of every state legislature. Everywhere it is evident that all substantial interests in a state or in the nation now consider it highly expedient to be represented before legislative bodies by an agent or agents.

The practice is, of course, not particularly new, but never before have legislative bodies been subjected to such a continuous and powerful bombardment from private interests as at present, and never before has the practice of lobbying been carried on with such great resources and with such finesse. Lobbyists were known several generations ago, but they were not numerous and they operated according to the political fashions of their age, that is, quite coarsely and brutally. They had no qualms about buying legislation openly. Lobbyists today, however, although not noted for their angelic purity, operate quite differently from their predecessors—we hope less objectionably.

It is not unnatural that a matter which the private interests of the country consider so important should receive attention from legislative bodies. The limitation and regulation of lobbying is a problem that affects the legislature first of all. The public interests are also involved, but to protect itself and to enable itself to function in a normal way, the legislature should aim to choke off every practice which denies it any of its rightful prerogatives, and which tends to bring it into public disfavor. And, interestingly enough, investigation discloses that legislatures have not ignored the practice of lobbying, but on the contrary have seen fit to bring it within the scope of state regulation.

Indeed, for the most part quite unnoticed, there has been built up a substantial body of statutory law on the subject. At the present time (1927) there are thirty-two states with laws of one kind or another dealing with lobbying. These laws vary in certain particulars, but in general they follow the same lines. Most of them are rather short, but the better ones are longer and more detailed.

The three provisions of lobbying laws which appear most frequently are, first, the requirement of registration; second, the requirement of filing expense accounts; and third, the prohibition of contingent compensation. Many other provisions of value, however, are found in the laws of a few states. Some states, for instance, pay particular attention to the enforcement provisions, in most cases making the attorney-general responsible for the prosecution of violators. Several states prohibit public officials from acting as lobbyists, or from in any way attempting to influence legislation. The Massachusetts law states that "no member of a state or district political committee shall act as a legislative agent."

Several of the state laws are too brief, and hence inadequate. The Utah law is a case in point. The law of West Virginia merely prohibits lobbying on the floor of either house while the legislature is in session, a regulation which is obviously insufficient. This West Virginia law is probably the weakest of all the state laws on the subject. The California and Montana laws are very deftly worded to prohibit any persons from attempting to influence a member of the legislature "by menace, deceit, or suppression of the truth." This provision, of course, still permits some of the most dangerous lobbying to continue unabated. Several of the state laws have been carefully drawn. Among states possessing the best laws may be mentioned Wisconsin, Indiana, New York, and Ohio. The law of Wisconsin is probably the most stringent of the four.

Along with the question of how many laws there are on the statute books, it is quite as important to ascertain whether or not these laws have

been effective in preventing the evils legislated against. The experiences of Ohio, New York, and Wisconsin give us considerable light on this phase of the subject.

In Ohio, where there is a good law, lobbyists have been rather careless about observing its provisions. Furthermore, there has been little or no interest, either in the legislature or outside of it, in holding them to the strict letter of the law. In 1921, one hundred and sixteen lobbyists registered according to the provisions of the law. In 1925, one hundred and ten registered. The interesting fact about the registrations in 1925 is that most of them were made after the senate had passed a joint resolution asking the secretary of state to inform the legislature how many lobbyists had registered. Another provision of the Ohio law which requires lobbyists to file expense accounts showing the expenditures made to influence legislation has not been of any value; a perusal of the expense accounts which have been filed shows that in every case the lobbyists have said, "received nothing and spent nothing." It can thus be seen that the Ohio law has not been carefully enforced and has not eliminated the evils which accompany unrestricted lobbying.

In New York, where there is a good law on the subject, some of the most flagrant cases of sinister lobbying can be found. Early in the 1927 session a member of the legislature complained that a lobbyist actually stood beside the clerk and checked up to see how the various members voted on a proposition in which he was particularly interested. It is very well known at Albany that lobbyists do practically as they please, ignoring at least the spirit of the lobbying law. From the point of view of wording, the New York law is a good measure, but it has by no means been sufficient to cope with the problems presented by the presence of innumerable lobbyists.

The Wisconsin law, which is one of the most thoroughgoing and stringent in the country, forbidding, as it does, all influencing of members except by means of public testimony or statement, has in general been successful. The attorney-general reports that there have been no prosecutions under the law. It has been complied with very generally and no one attempts to appear before the legislature or to engage in lobbying without registering and complying with the terms of the act. The law seems to be not only a good one, but also effective.

If it were necessary, it could be demonstrated that in other parts of the country the laws on the subject have not worked out as satisfactorily as a reading of them would indicate. The experience, therefore, which the various states have had with lobbying laws hardly indicates that the problem of regulating lobbying has been solved, or is even under reason-



able control. The anti-lobbying laws are thus like many other laws which have been placed on the statute books only to be forgotten and never to be enforced.

Of course it is far easier to state the evil than to suggest the remedy. But if legislatures really intend to regulate lobbying in an effective way, they should have no more difficulty with this subject than with a number of others for which they have already legislated effectively. In any event, the enforcement provisions of the law should be carefully drawn, for the value of the law depends almost entirely upon the effectiveness of its enforcement. Some person must be made responsible for the enforcement of the law, because what is everybody's business is nobody's business.

Furthermore, it might be wise to give some proper official the power to demand under oath, before a measure finally becomes law, a detailed statement concerning the methods used and the money spent on that measure. This provision would make enforcement more effective and would tend to deter improper practices, because of the fear of publicity. Publicity is the weapon which seems most likely to accomplish the defeat of all activities inimical to the public interest. Consequently, whatever will bring lobbying out into the open, or will throw the light of publicity upon it, should be attempted.

It is also a matter of importance to indicate properly what is meant by the term "lobbyist." It is an essential part of any good statute, whenever there is the least doubt, to define the terms included in it, and since there is considerable difference of opinion about the term "lobbyist," a definition is very necessary. Some state laws neglect to do this, and the omission is quite serious, because unless the law definitely states what constitutes lobbying, all those who attempt to influence legislation will claim that they do not come within the terms of the act—that someone else was intended. The law thus becomes useless and soon is relegated to the legislative scrap heap. Consequently, a careful definition seems necessary to a good lobbying statute.

Finally, the general provisions regarding registration, filing of expense accounts, and prohibition of contingent compensation should be included in a good law. No law thus far is really effective in regard to filing expense accounts. The trouble is that the expense accounts, if filed at all, are made public too late to affect the legislation for which money may have been expended. It is likely that a period of one week only should be allowed for filing expense accounts after the legislature has adjourned. Thirty days is too long a period, because in most cases it does

not even permit the governor to veto a bill, by reason of excessive expenditures in its behalf, in time to count.

Although lobbying flourishes at Washington, Congress has not seen fit to regulate it. Scarcely an important bill passes without some complaint being made that a highly paid lobby has unduly interfered with its enactment. Congress is thus lagging behind the states in the matter of regulating lobbying, even though, as has been pointed out, the mere existence of a law does not ensure the elimination of all evils connected with the practice. Perhaps, after all, we should agree with the farmer who suggested that the only way to keep track of lobbyists is to require them to wear yellow ties. It is certain that mere legislation has its limits, and until a legislature can be found all the members of which refuse to have any private dealing with the representatives of special interest, it is likely that some of the most sinister forms of lobbying will continue. Few lobbyists, for instance, object to being registered, because this requirement does not prevent them from influencing legislators; and the experienced lobbyist can work effectively even though barred from the floors of the houses. But, even so, a good lobbying law places the legislature in a strong position to protect itself from the assaults of privilege-seeking agents, and tends to penalize those who are trying to live on its favor.

#### **b. The Wisconsin Anti-Lobbying Law**

[*Wisconsin Statutes*, 1925, vol. I, pp. 2279-2281.]

346.19. Any person who shall, directly or indirectly, give or agree or offer to give any money or property or valuable thing or any security therefor to any person, for the service of such person or of any other person in procuring the passage or defeat of any measure before the legislature or before either house or any committee thereof, upon the contingency or condition of the passage or defeat of such measure, or who shall receive, directly or indirectly, or agree to receive any such money, property, thing of value or security therefor for such service, upon any such contingency or condition, or who, having a pecuniary or other interest, or acting as the agent or attorney of any person in procuring or attempting to procure the passage or defeat of any measure before the legislature or before either house or any committee thereof, shall attempt in any manner to influence any member of such legislature for or against such measure, without first making known to such member the real and true interest he has in such measure, either personally or as such agent or attorney, shall be punished by imprisonment in the

county jail not more than one year or by fine not exceeding two hundred dollars.

346.20. Every person, corporation or association which employs any person to act as counsel or agent to promote or oppose in any manner, the passage by the legislature of any legislation affecting the pecuniary interests of any individual, association or corporation as distinct from those of the whole people of the state, or to act in any manner as a legislative counsel or agent in connection with any such legislation, shall, within one week after the date of such employment, cause the name of the person so employed or agreed to be employed, to be entered upon a legislative docket as hereinafter provided. It shall also be the duty of the person so employed to enter or cause to be entered his name upon such docket. Upon the termination of such employment such fact may be entered opposite the name of any person so employed either by the employer or employe.

346.21. The secretary of state shall prepare and keep two legislative dockets in conformity with the provisions of sections 346.20 to 346.26, one of which shall be known as the docket of the legislative counsel before committees, and the other as the docket of legislative agents. . . . In such dockets shall be entered the names and business address of the employer, the name, residence and occupation of the person employed, the date of the employment or agreement therefor, the length of time that the employment is to continue, if such time can be determined, and the special subject or subjects of legislation, if any, to which the employment relates. Such dockets shall be public records and open to the inspection of any citizen upon demand at any time during the regular business hours of the secretary of state.

346.22. . . . No person shall be employed as a legislative counsel or agent for a compensation dependent in any manner upon the passage or defeat of any proposed legislation or upon any other contingency connected with the action of the legislature, or of either branch thereof, or of any committee thereof. No person whose name is entered on the docket of the legislative counsel shall render any service as legislative counsel or agent otherwise than by appearing before a committee, . . . or by giving legal advice in the case of regular legal counsel of corporations or associations, unless his name is also entered on the docket of legislative agents.

346.23. Legislative counsel and agents required to have their names entered upon the legislative docket shall file with the secretary of state within ten days after the date of making such entry a written authorization to act as such, signed by the person or corporation employing them.

346.24. Within thirty days after the final adjournment of the legislature every person, corporation or association, whose name appears upon the legislative dockets of the session, shall file with the secretary of state a complete and detailed statement, sworn to before a notary public or justice of the peace by the person making the same, or in the case of a corporation by its president or treasurer, of all expenses paid or incurred by such person, corporation or association, in connection with the employment of legislative counsel or agents, or in connection with the promoting or opposing in any manner, the passage by the legislature of any legislation coming within the terms of section 346.20. Corporations and individuals within the provisions of sections 346.20 to 346.26 shall render such accounts in such form as shall be prescribed by the secretary of state, and such reports shall be open to public inspection. . . .

346.26. Sections 346.20 to 346.26 shall not apply to any municipality or other public corporation.

346.27. It shall be unlawful for any person employed for a pecuniary consideration, to act as legislative counsel or legislative agent, as defined by sections 346.20 to 346.26, to attempt personally and directly to influence any member of the legislature to vote for or against any measure pending therein, otherwise than by appearing before the regular committees thereof, when in session, or by newspaper publications, or by public addresses, or by written or printed statements, arguments, or briefs, delivered to each member of the legislature; provided, that before delivering such statement, argument, or brief, twenty-five copies thereof shall be first deposited with the secretary of state. No officer, agent, appointee, or employe, in the service of the state of Wisconsin, or of the United States, shall attempt to influence any member of the legislature to vote for or against any measure pending therein, affecting the pecuniary interests of such person, excepting in the manner authorized herein in the case of legislative counsel and legislative agents.

346.28. It shall be unlawful for any person employed for a pecuniary consideration, to act as legislative counsel or legislative agent, as defined by sections 346.20 to 346.26, to go upon the floor of either house of the legislature, reserved for the members thereof, while in session, except upon invitation of such house.

## 125. LEGISLATIVE REFERENCE BUREAUS

Because of the increasingly complicated conditions of modern legislation, it is now widely recognized that there should be maintained at the state capital an expert agency to assist the legislature in drafting bills and collecting information

needed in the work of legislation. The vicissitudes through which these agencies have gone and their general status are described in the following selection.

[J. H. Leek, "The Legislative Reference Bureau in Recent Years," *American Political Science Review*, vol. XX, pp. 823-831 (Nov., 1926).]

The legislative reference bureau has come to be so much an accepted part of governmental machinery that it is no longer the object of praise and attack that it was a few years ago. Like so many other structural reforms in government that were at first hailed as harbingers of the millenium or condemned as destructive or subversive factors, depending on the viewpoint of the commentator, the legislative reference bureau has realized neither the extravagant claims of its advocates nor the dire prophecies of its detractors.

It is worthy of note, however, that there are very few instances where states, having once committed themselves to a whole-hearted experiment in legislative reference work, have abolished their bureaus. There are numerous cases, of course, where the legislature has skimped the bureau on funds and thus curtailed its work, but this is almost the normal experience of many governmental institutions of proved worth. At the present time, almost everybody in any way connected with or conversant with the work of the state government will admit that a legislative reference bureau meets a real need and performs a valuable service. This does not mean, of course, that there is complete agreement as to the exact functions which the bureau shall perform, or as to the way in which it shall carry on its work. There remains a considerable difference of opinion on these matters.

At the present time, probably three-fourths of the states make provision for legislative reference work in some form or other, while it is likely that in the remaining states such functions are performed in such fashion as existing institutions find possible in the absence of *ad hoc* appropriations and facilities. Numerically there has been practically no expansion in the field of legislative reference work in the past ten years. A few additional functions have, however, been put to test in existing bureaus, and several states have experimented with various forms of administration and control. There have been, too, several noteworthy upheavals threatening the continued existence of bureaus. Such matters as these, indeed, comprise the only developments of note in legislative reference work during the past ten years.

Speaking broadly, it may be said that the general scope and nature of legislative reference work became pretty well fixed by 1916, and there have therefore not been any wide departures or notable extensions in the work during the intervening period. Some additions to the tasks allotted



to the bureaus, however, and some variations in the accepted methods of carrying on recognized functions may be worth noting. To the customary function of keeping a card catalogue of bills introduced in the legislature and a record of their status to date, the Connecticut library adds an interesting variation in its practice of making photostat copies of all bills introduced. The reason for this particular practice is the rule of the legislature that no bill shall be printed until it is favorably reported by a committee. A number of bureaus, for instance that of Illinois, have undertaken the task of preparing a periodical bulletin (the Illinois statement appears on the desk of the legislators every week) giving a brief of every bill introduced, together with a statement as to its progress and disposal up to the time of printing. The Virginia bureau goes a bit further in that it prepares, after the legislative session has ended, a lengthy commentary on the legislation passed during the session and its relation to the pre-existing statute law of the state. The pamphlet issued in 1921 covered over one hundred pages. It represents work undertaken, over and above the functions assigned by law, in a gratuitous attempt to extend the usefulness of the service.

One activity which, it would seem, might normally go with the work of a legislative reference bureau is that of codification and consolidation of the statute laws. Of course, very few states are committed to a policy of codification. Nevertheless every state ought to make some provision for a periodic consolidation of its laws, in order that its statutes may not be in such a state of confusion as to be incomprehensible. Thus far only very few states have put such a function on their bureaus. The Pennsylvania bureau is a notable exception, it being specifically directed by a statute of 1923 to undertake such work of that nature as the legislature may designate. The bureau has already issued several codes, the work being carried on in the interim between sessions of the legislature. Under a recent (1925) Indiana statute, the director of the bureau is made *ex officio* revisor of statutes, and is a "member of every commission which may be appointed by the governor or by virtue of any law to codify or revise any statute." But such work, to be carried on between sessions, is not to be undertaken except upon express authorization of the governor or the legislature. It is interesting to note that Wisconsin, which has made perhaps the most intensive use of its bureau of any state in the Union, provides a separate official, known as the revisor of statutes, not connected with the bureau, for the work of consolidating the statutes and bringing them up to date. Wisconsin is the only state in the Union, incidentally, that adheres to the practice of issuing a complete codification of its laws after every session of the legislature.



Massachusetts has of late undertaken one of the most unique and interesting experiments along this line. For the past five years the state has maintained a system of continuous consolidation whereby, although no definite codification such as that of Wisconsin is made, the laws are kept up to date and classified in such a way that one can easily find the whole body of law upon a given subject. The work is carried on under statute of 1920, which provided for permanent counsel to the House and Senate who should "annually prepare a table of changes in the general statutes, an index to the acts and resolves, and shall from time to time . . . consolidate and incorporate in the General Laws all new general statutes . . . shall so far as possible draft all bills proposed for legislation as general statutes in the form of amendments of or corrections in the General Laws . . . may from time to time submit to the General Court such proposed changes or corrections in the General Statutes as they deem necessary or advisable. . . ." In connection with this scheme a loose-leaf method of binding the laws is used, so that new legislation can immediately be inserted in its proper place, and its relation to the pre-existing laws on the same subject becomes immediately evident.

During the past several years the bureaus have in various instances played important parts in connection with constitutional conventions. In some cases, for instance the Illinois constitutional convention of 1919-20, the bureau was specifically directed by law to compile data of interest to the members of the convention, and a special appropriation was made to cover the work. A series of voluminous publications bearing on the diverse problems of state government, prepared by various authorities under the direction of the legislative reference bureau, was subsequently issued. The Pennsylvania bureau gathered a considerable amount of material in connection with the constitutional revision convention of 1921; while the New York and Nebraska bureaus also have aided conventions in their respective states. In some instances much valuable work of this sort has been done by bureaus without any specific direction from the legislature, and without any additional funds.

Perhaps the most lengthy and detailed list of duties assigned to any bureau is found in the Indiana law of 1925, which reorganizes the reference agency and incidentally renames it the "legislative bureau." In addition to the stock functions of reference library work and bill-drafting, the Indiana bureau is directed to compile statistical information of all sorts, and to edit the State Year Book; the director is *ex officio* revisor of statutes; the bureau is made the repository of all bills, resolutions, and documents introduced in the legislature, is assigned the task of printing and editing the House and Senate journals, and is directed to assist the

secretary of state in preparing and indexing the acts passed by the Assembly.

There has been more experimentation in matters pertaining to control and administration of legislative reference bureaus than in the functions entrusted to them. The reason for such instability will be considered after several of the changes have been briefly set forth. Bureaus normally are placed under the appointing power of the governor, or of the legislature, or of some supposedly non-partisan body such as a library board; and in most cases there is no change from the type of control first chosen. A few states, however, have made such changes. . . .

In several instances these surface changes are an indication of deep-seated difficulties which, although not much is said about them, are perhaps to date the most stubborn obstacle to the successful carrying out of legislative reference functions. Some bureaus have been accused of political bias; others have been charged with trying to influence legislation. But almost everywhere the bureau finds it difficult to avoid being embroiled, sometimes openly, in contests between governor and legislature; hence the importance of this matter of control. Despite the tendency of political parties to bridge the gap between legislative and executive, the antiquated theory of checks and balances continues to work only too successfully. Only comparatively rarely does a governor manage to keep on good terms with his legislature, even though both are of the same party; while frequently an open feud exists between them.

If, under such circumstances as these, the legislative reference bureau is controlled by the legislature, it is distrusted by the governor; whereas if it is in the power of the governor, that section of the legislature which is opposed to the governor will be suspicious of the bureau and will refuse to make use of it. Sometimes a bureau is able to show a remarkable record of activity so far as the number of bills drafted is concerned, while the actual effect of its work on the statute law of the state is slight, the reason being that the administration bills are not entrusted to it at all. Where such conditions exist the respective parties to the dispute will find other agencies to draft their bills, such, for instance, as the attorney-general's office, or highly skilled private individuals. It may be objected that bill-drafting is a purely technical function in which personal bias cannot play a part. But the ease and innocence with which a joker can be slipped into an important bill has been demonstrated too often, and sponsors of bills do not care to take chances. Perhaps this difficulty can be obviated in part by placing the work of the bureau under the control of some non-partisan board, but even here the control, indirect and remote though it may be, will rest predominantly with the governor or

with the legislature. No remedy for such a state of affairs has thus far been suggested except the provision of separate facilities for bill-drafting. The conditions seem to be inherent in our type of government, and therefore ineradicable as long as the type remains unchanged.

In three or four states legislative reference work has been completely discontinued, but no such calamity has befallen any state which had a thoroughly established and efficiently functioning bureau. . . .

With the lapse of time and the accumulation of experience, the legislative reference bureau has come to fill a recognized place in state government, with fairly definite and circumscribed functions. Presumably its first period of growth and expansion is over. It has not brought about any revolutionary change in the quality of state government, but it was not to be expected that it would do so. On the other hand, many students of government and legislation agree that in such states as Wisconsin and Indiana, where bureaus have been especially active and efficient, there has been a marked improvement in the quality and arrangement of the statute law.

In general, the tendency has been rather toward a narrowing than an extension of function. Whenever the bureau has gone beyond the strict bounds of its work, and has attempted, however laudably from the standpoint of reformers and students of government, to aid in bringing about certain reforms, trouble has resulted. Too often in such circumstances the bureau has come to be looked upon as the tool of a certain faction in the government, and the ultimate result of its well-intentioned efforts has been a curtailment of its usefulness. Apparently the moral is that the bureau should stick strictly to its knitting, and not allow its personal convictions to play the slightest part in the carrying out of its functions. In other words, its function is purely ministerial, not discretionary. Such an attitude has been carefully fostered and built up over a long period of years in the office of the British Parliamentary Counsel to the Treasury, and it would seem that we are approximating it in the United States.

Of all the elaborate plans for expanding legislative reference service which have been enthusiastically set forth from time to time, practically none has been brought to fruition. Senator Owen's scheme for building up a very extensive legislative reference service for the national government, to be connected with a graduate school of government and legislation, seems to be farther from fulfillment than when it was first broached. Nor does it seem likely that any state will in the near future attempt the plan suggested by John A. Lapp—a variation upon that first set forth by John Stuart Mill in his *Representative Government*—namely, the entire

withdrawal of the law-drafting function from the legislature, leaving that body only the alternative of accepting or rejecting bills drawn by a commission of experts. Even the much less drastic proposal of submitting all bills to the legislative reference bureau for technical revision and suggestion has been accepted only in very few American states, notably Connecticut and Vermont.

The inception and early development of the legislative reference bureau belong to the first decade of the twentieth century—a time of progressivism and hopeful experimentation in matters governmental. At present we are going through a period of disillusionment and conservatism, and proposed experiments are viewed with disfavor. Probably in a few years, when the wheel has turned full circle, we will have another era of experimentation, and we may then have an opportunity to test these larger plans. Meanwhile, the legislative reference bureau is carrying out its routine work of library reference and bill-drafting, and there are few who advocate its discontinuance.

## 126. PROBLEMS OF LEGISLATIVE ORGANIZATION AND WORK

The following article contains a survey of the problems, both practical and fundamental, of the organization and work of the legislature. It was prepared for the use of the Illinois Constitutional Convention of 1920–1922, and has special reference to conditions in that state. For the most part, however, it applies equally well to the states generally.

*[Illinois Constitutional Convention Bulletins, 1920, pp. 588–597.]*

A state legislature is essentially the affirmative organ of the state government for the development of new policies, or for the establishment of new principles. The executive has little or no authority to establish new policies, and the courts have less power to do so. The legislature, as the organ of the state government for affirmative action, should of course be so organized that it may operate effectively for this purpose.

During certain periods in the development of English law, legislative action was perhaps the most decisive influence in the development of the principles of private law. However, on the whole, the English legal system has in its main lines developed as a result of judicial action, and the legislature has normally limited itself to the meeting of new problems which could not be satisfactorily handled by the courts, or to the problem of restating in statutory form the results of judicial action. Occasionally important acts, such as the negotiable instruments act, the uniform sales act, and the uniform partnership act, are enacted by the

General Assembly summing up and seeking to codify the existing law, with such changes as may seem desirable. Such an effort at legislative restatement of the whole law upon a particular subject is not frequent; and within the field of private law a session of the Illinois General Assembly ordinarily deals with only a small number of problems in which some specific difficulty may have presented itself.

The work of the Illinois General Assembly may, therefore, be said not to relate primarily to the development of rules for the regulation of relations between private individuals. Sir Courtney Ilbert remarked some time ago of the English Parliament that not one-tenth of the work of a session related to matters of private rights, and that the remainder related to matters primarily administrative in character. The same statement may be made regarding the work of the Illinois General Assembly. The great mass of its work relates to matters other than those which have to do with the relations between private individuals. Of course, the appropriations for the support of the state government and legislation regarding the administrative functions of the state and of the local subdivisions of the state are equally as important to the citizen as is legislation regulating the private rights of one citizen as against another. However, legislation which is primarily administrative in character involves problems of a distinctly different sort from that with respect to matters of private right.

An analysis of the legislative work of the General Assembly of Illinois in 1917 and 1919 indicates that of the 338 laws enacted by the General Assembly at its regular session in 1917, only seventeen can be classed as regulating primarily the private rights of parties among themselves. Of the 429 laws enacted at the regular session of the Illinois General Assembly in 1919 only fourteen belong to this class. A table is given below indicating in a rough fashion the types of matters dealt with by legislation in Illinois at these two sessions:

	1917	1919
State appropriations .....	63	67
Laws relating to state administrative matters .....	150	177
Laws relating to local administrative matters .....	108	171
Laws relating to purely private rights .....	17	14

Acts containing new substantive matter of legislation and merely containing appropriations incident thereto are not classified as appropriation acts. It is difficult to make a distinction between state and local administrative matters, and doubts have been resolved in favor of classification as local matters. The numerous acts readjusting local tax rates in 1919



are responsible for the large proportion of laws for that year classified as relating to local administrative matters.

This table probably indicates with sufficient clearness that the problems of legislation are primarily problems connected with the operation of state and local governments, and not problems having to do primarily with the rights of private individuals among themselves. In the case of state appropriations and of substantially all legislation regarding state administration, the information upon which legislation is to be based must be obtained primarily from the existing executive governmental agencies of the state, and with a better organization of the executive government the information for such legislation will be much more easily available than at the present time.

For matters relating to local administration, information again must to a great extent come from the state executive offices which have a general supervision over the different functions of local government. For example, with respect to schools and with respect to local charitable administration, a good deal of the impulse for legislation may come from the local communities, but this centers largely upon the state executive offices having supervision over these matters. Comment is made later in this discussion upon the fact that there is no constitutionally recognized relationship between the General Assembly and the executive department with respect to the enactment of legislation, although perhaps fully nine-tenths of the work of the General Assembly at each of its sessions must be devoted to legislation or proposed legislation having to do with the administration of government.

The chief problems of legislation coming before the General Assembly are problems of a technical character, requiring information regarding the actual operation of government and regarding the operation of similar institutions elsewhere. Legislation is a technical expert task and in the states of this country it is performed by a body, the length of whose session is in most cases narrowly limited. In Illinois where there is no constitutional limit, the General Assembly meets for five or six months in each two years, and the members during that five or six months' period return home ordinarily at the end of each week.

The executive veto operates as a purely negative check, and even as a negative check is exercised in the main in such manner that defects in proposed legislation detected by the governor cannot be corrected by the General Assembly. As has already been suggested, substantially all the bills come to the governor at the end of the session, and his action upon these bills is reported to the legislative bodies which have met merely in a formal manner and ordinarily without a quorum.



The whole development in the states of this country has been that of throwing limitations around the performance of legislative function, and of reducing the periods within which the legislature may act. Attention has already been called to the fact that annual sessions of legislatures have almost ceased in this country and also to the fact that legislative sessions are in most states limited to a fairly brief period. No limitations upon the legislative session exist in Illinois, and normally the General Assembly sits from January until close to the first of July, taking a recess a sufficient time before that date for the governor to act upon bills, and for laws to come into effect on the first of July, as now required by the constitution. Legislative bodies have not only been restricted in the frequency and length of their sessions, but their power has also been limited in this and other states by the development of the executive veto. The function of legislation is the affirmative task of laying down new policies and the executive veto has come to be primarily a negative check.

Detailed limitations as to its procedure and as to the things which it may do have been placed around the legislature in such a manner that pitfalls exist in substantially every direction. Even the most carefully drafted legislation may have overlooked some one of the pitfalls which has been planned by the constitution, and even if such pitfalls have all been carefully avoided there is great danger of violating some constitutional provision as to procedure in the numerous steps of its cumbersome legislative process through which every bill must pass before it becomes law. Legislation has therefore become a hazardous occupation.

Distrust of legislatures developed very early after the independence of this country, and that distrust has led to a hampering of the legislative function in so many respects that effective and valid legislation has become an extremely difficult thing. Little has been done as yet in this country toward the working out of plans by which the General Assembly may be made a responsible legislative body for the affirmative enactment of state policies. Substantially all the development has been toward limiting and restricting the General Assembly's power for evil, upon the apparent assumption that a legislative body is merely a necessary evil. Naturally little has been accomplished under this theory in the bettering of legislative organization.

The legislative body under the constitution of Illinois is and can be in no sense a body of lawmaking experts. Members of the General Assembly are elected from all walks of life for the purpose of giving ordinarily not over six months out of each two years of their time to the business of legislation. They may well represent under the plans now

in existence the sentiment of the community with respect to broad matters of public policy, but such broad matters are rather infrequent as compared with the more detailed and more technical matters which must be dealt with by legislation.

The principle of the separation of powers is formally embodied in the constitution of Illinois, but is expressly subject to all of the exceptions made in the text of the constitution itself. This principle was announced in the constitution of 1818, but the constitution of that year did little toward establishing the principle in practice. From 1818 to 1848, the legislative department was predominant and largely controlled the executive and judicial departments. Such a predominance of the legislative department characterized all state governments after the declaration of independence, and independent spheres of executive and judicial departments gradually became established in the fifty years following 1776. The increased power of the executive and judicial departments has come about primarily through the vesting in these departments of power at first regarded as legislative.

In a discussion earlier in this pamphlet upon the relations of the General Assembly with other departments of the state government, attention has been called to the express constitutional provisions bearing upon relationships with other departments. A number of exceptions have already been made to the principle of the separation of powers and perhaps the greatest exception to this principle in actual operation is that as to the relationship between the governor and the two houses of the General Assembly, when the executive and legislative branches of the state government are in accord. Much the greater part of legislative business bears upon the operation of government and it is essential that the executive and the legislative departments should work in close harmony upon these problems, for the executive is not only the body which will know most about the operation of existing laws (which it is itself administering) but it is also the body which will administer or supervise the administration of all new administrative legislation. It is essential that the General Assembly obtain from the executive department a large mass of information upon which new legislation may be based, and when the governor and the two houses of the General Assembly are in accord it is also natural that the governor as the head of the executive department should have a large influence with the legislative department in the final determination as to what legislation shall be enacted. Such an affirmative relationship between the governor and the General Assembly is now recognized by Article V, Section 7 of the constitution. The governor is required to give the General Assembly information as to

the condition of the state and to recommend such measures as he shall deem expedient.

The theory that the governor and the legislature must be absolutely distinct and must operate in more or less separate and water-tight compartments, carefully refraining from relationship with each other, is absolutely unworkable; and such a theory has never been a necessary conclusion from the principle of the separation of powers; nor has it ever been an actuality except in cases where through disagreement between the two departments, the state government was working inefficiently.

There has been in recent years a very definite tendency to recognize in the governor a more positive share in the actual making of legislation. A vigorous man in the office of governor always exercises a large influence in legislation, and the state is better off for such exercise. Bills sponsored by the governor ordinarily obtain precedence in the two houses. Not only this, but the legislative body is more effective under such conditions and is better able to perform the functions for which it has been established.

The veto power, it has already been suggested, is primarily a negative function exercised at the end of a legislative session, when any suggestions which the governor may have for the improvement of legislation cannot be availed of. Constitutional provisions in Alabama and Virginia and a recent constitutional provision in Massachusetts regarding the governor's recommendations upon bills presented to him after passage by the two houses, indicate a step in the direction of giving the governor a larger affirmative share in legislation; but the governor cannot exercise an affirmative share in legislation by passing upon bills submitted to him, if the bills come to him at the end of the legislative session, so that he has merely an alternative of approving the bill or of vetoing it, without there being a possibility of improving it in co-operation with the General Assembly. The budget provisions in Maryland and Massachusetts also reflect a growing tendency to increase the affirmative share of the governor in legislation, and here this affirmative share in legislation comes through the recommendation of a detailed budget. In Maryland the governor's budget is preserved through a prohibition of legislative increase in its items (a prohibition similar to that established by rules in the British House of Commons). In Massachusetts the governor's control is established by permitting the general court to increase items in the budget, but by granting to the governor at the same time an authority to reduce items or veto parts of items, so that he may,

if the general court has increased his recommendations of appropriations, reduce them to the amounts of his original recommendation.

However, little has on the whole been done in this country toward bringing about an effective co-operation between the executive department and the legislative department in matters of legislation. It may be desirable to repeat here that the need for a constitutional recognition of such closer relationship depends upon two things:

(1) The fact that the bulk of work to be performed by a legislative body has a direct bearing upon the work being done by the executive body.

(2) The further fact that the legislative body now is and is likely to remain a body not in constant session, but meeting only for several months in each legislative period. A body assembled as is the general assembly of Illinois has no opportunity when once it has come into session to accumulate all of the data necessary for effective legislation. Such accumulation of data and preparation of information must come in advance of the legislative session. The general assembly meets on an average of about three days each week for some six months during each twenty-four months, and the members in general find it necessary to continue their private business to some extent even during sessions. To expect from a body of this type, no matter how able, honest and hard-working the members of such a body may be, a high grade performance upon a great number of technical measures is futile, unless the executive as the permanent organ of the state government has some machinery for bringing these matters effectively to the attention of the legislative body. By the constitution of 1870, an effort was made to draw the courts in as an aid to legislation, by requiring them to report defects in the laws, but this plan has not worked.

The separation of the legislative and executive functions is now accentuated by the provisions in Sections 3 and 15 of Article IV of the constitution, preventing any person elected to the general assembly from receiving any civil appointment in this state during the term for which he shall have been elected, and forbidding any person holding a lucrative office under the United States or this state from having a seat in the general assembly. These provisions do not prevent the giving of political rewards to legislative leaders. If the party in control of the state government is also in control of the national government, appointments to office are oftentimes made to national positions of those who under this constitutional provision would be disqualified from holding state positions. These constitutional provisions do not as a matter of fact

prevent the objectionable practice at which they are aimed, but they do often result in taking persons having some information about state government out of the service of state government and into the service of national or local government.

Attention has already been called to the difficulties in the operation of our government when the executive belongs to a political party which does not at the same time control the two houses of the legislative department. This lack of political harmony between the executive and the legislative departments has been quite evident in the national government during a good part of the time since the civil war. In the national government at least there is a tendency for the party in the minority in a presidential election to control the federal house of representatives in the intervening election between presidential years.

In the Illinois general assembly cases of purely partisan alignment upon legislation are not frequent. Upon the bulk of important legislation no party lines are drawn, and in the past at least the issue between "wet" and "dry" has been much more important than that between democrat and republican. However, it should not be inferred from this statement that it is therefore immaterial as to whether the governor and the two houses of the general assembly are in political accord. Although party alignments are infrequent, the control of the two departments of the government by different parties makes a great deal of confusion and friction. Attention may also be called to the fact that, for political reasons, the governor has greater influence with the general assembly meeting when his term begins than with the one meeting in the middle of his term, even though in both cases there is political accord between the governor and the majorities of the two houses.

The English parliamentary system, which has been adopted very widely throughout the world, has a distinct advantage in that it keeps a constant political harmony between the legislature and the executive departments. Under the parliamentary system as it operates in England, and in most of the countries which have copied from England, the executive part of the government is controlled by a cabinet whose members are of the same party as that which controls the more popular branch of the legislature, the members of the cabinet resigning or forcing a new popular election when they cease to be in harmony with the legislative body. In this manner the legislative body is always able to force a change of cabinets or at least an appeal to the electorate to determine whether the existing cabinet and the party it represents should remain in power. Either by the resignation of the cabinet or by its success or fail-



ure in the general election, political harmony between the legislature and the executive is restored almost immediately after it has once ceased to exist. The English parliamentary system almost necessarily, however, requires either a single-chambered legislature or a legislative organization in which one house has the dominant political control.

In this country the system of separate executive and legislative organizations works best when the executive and legislature are not only in political harmony but when the personnel of the two departments is such that effective co-operation may be had. When there is not political harmony, or when there is not full co-operation, even if there is apparent political harmony, the governmental organization in this country works badly or almost not at all. That is, the theory (although somewhat modified by express constitutional provisions) implies a rather distinct separation of departments; but the system based upon this theory works well only when such separation is in fact largely broken down and when a close co-operation is established through extra-constitutional means.

Assuming political harmony to exist at any time between the two departments in a given state, the co-operation of the two departments is of course rendered more effective if the legislative leaders are not changing at frequent intervals. Under our cumbersome system of legislative organization, it normally requires several sessions for a man to develop a close familiarity with the details of governmental problems. The senate in this state is so organized under the constitution that substantially one-half of the members are elected each two years, so that at least one-half of the members have always had previous legislative experience. Of course it is also true that members of the state senate are often re-elected or that members of the house are elected to the state senate, so that continuous legislative service in the senate is increased in this way beyond that required by the constitution. In the session of 1917, of the twenty-five newly elected members of the senate, five had seen service in the immediately preceding session of the house of representatives, and nine had previously been in the state senate. In the session of 1919, of the twenty-six newly elected members of the senate, nineteen had had legislative service immediately preceding their election.

No constitutional provision requires continuity of service in the house of representatives, although by election a fair degree of continuity is maintained. In the Fiftieth General Assembly (1917), of the 153 members, 90 had served in the next preceding session either of the senate or of the house of representatives. In 1919, of the 153 members of the house of representatives, 97 had served in the next preceding session either of the senate or of the house of representatives.



A member by frequent re-elections to the house or senate acquires a degree of expertness in legislative matters, and some continuity of membership through re-election is almost necessary to the working of the present cumbersome machinery of legislation. A house of representatives composed entirely of persons without previous legislative experience would be almost helpless, however high the ability of its members may be.

Anyone who has had to deal with the legislative organization of Illinois or of any other state must be impressed by the cumbersomeness of the present legislative machinery. Skill and persistence are required to take a piece of proposed legislation through all stages in each house and finally through the process of executive approval. No plans have been worked out by the constitution or through legislative procedure for the careful co-ordination of the work of the two houses. The citizen without legislative experience ordinarily finds himself lost when he comes for the first time in contact with this highly cumbersome procedure. The theory upon which this procedure and the limitations upon the legislature have been built up is apparently that the legislature must be practically prevented from doing anything in order that it may be prevented from doing wrong things, and such a plan is practically certain to lead to undesirable consequences.

The process of legislation has two distinct aspects: (1) The expert, (2) the popular. Any legislative organization should be of such a character as to reflect upon matters of legislation the needs and the views of the people of the state. It must also be borne in mind, however, that the technical aspect of legislation is no less important, and that a large part of business to be acted upon by a legislature has to do with matters upon which the public may have very little opinion either way. Even upon matters with respect to which the public has positive views, the technical element is important and care upon the technical side of legislation is essential if the people are finally through legislation to get what they desire. This balancing of the technical and the popular aspects of legislation presents the most serious problem with respect to the matter now under consideration, and the problem is one which has not been dealt with to any extent as yet in this country. From the standpoint of the expression of popular opinion and the accumulation of popular views there is of course a distinct value in having a large popular body meet occasionally as is now the case with the Illinois General Assembly. Small bodies of technical experts holding office permanently or for long terms are not likely to be proper representatives of the popular views and the popular needs.

The functions to be accomplished by a legislative organization are: (1) Satisfactory positive action in accord with the views of the people of the state, and (2) technical correctness in the legislation enacted in accord with popular views and also in the enactment of the numerous measures needed for the proper conduct of administrative matters with respect to which the public at large will normally have no decided opinion one way or the other.

This combination of the temporary popular element in legislation with the permanent technical element in legislation may be worked out in several different ways:

(a) The permanent skilled element may be organized in the executive, which has necessarily a permanent, continuous organization, leaving the legislature with an organization more or less like that now in existence for the expression of the popular view upon matters presented by the executive, and also for the enactment into legislation of matters demanded by public sentiment but not proposed by the executive.

(b) There might be a permanent technical legislature such as that suggested in a quotation earlier in this pamphlet from a message to the Kansas legislature by Governor Hodges. Clearly, however, a small permanent body composed of technical experts would not be adequate as a means of reflecting the popular needs and desires in legislation, and if there were a small and permanent technical body such as Governor Hodges suggested, much of the work of such a body would have to be submitted either to a larger and more representative legislative body or to a referendum of the people.

(c) It may be possible to establish a permanent expert staff subject to the general assembly or to a combination of executive and legislative control, this permanent expert staff drawing up the measures suggested by the administrative bodies of the state and local government or by members of the legislature and submitting these measures to the legislature meeting very much as at present. The legislative reference bureau is an approach to what is here suggested, although the chief function of the legislative reference bureau has been that of drafting bills desired by members of the General Assembly, after they have come into session; and there has not as yet been any effective way of preparing in advance of the legislative session the matters which it may be desired to submit to the General Assembly.

## 127. THE LEGISLATIVE COUNCIL

One of the most significant and promising movements bearing upon the future development of state legislatures is the creation of the legislative council. One of its main purposes is to supply competent guidance in the formulation of a program before the legislature convenes. In the following selection, the origin and development of this movement is described, with special reference to the Kansas council.

[Frederic H. Guild, "The Development of the Legislative Council Idea," *Annals of the American Academy of Political and Social Science*, vol. 195, pp. 144-150 (Jan., 1938).]

The legislative council has now been in existence long enough to permit a partial test of its value, although there has not yet been sufficient time for full development of its possibilities. Of the three councils which have been in operation through more than one regular legislative session, two have been relatively inactive. The present report, in consequence, must necessarily be limited to the Kansas council, which has had nearly four and one-half years of continuous active experience.

## SPREAD OF THE COUNCIL IDEA

Beginning with the creation of an executive council by Wisconsin in 1931,<sup>1</sup> the council experiment has spread until there are now in existence seven legislative councils and the Wisconsin Executive Council. Kansas and Michigan, in 1933, established a council which was distinctly legislative.<sup>2</sup> In Virginia an Advisory Legislative Council established by executive order in 1935 was given legal status in 1936.<sup>3</sup> The Kentucky council of 1936 is primarily a commission on interstate coöperation, with the additional duty of serving as a legislative council to prepare a legislative program.<sup>4</sup> In 1937, Nebraska, Connecticut, and Illinois also adopted the council idea.<sup>5</sup>

The Wisconsin Council has been relatively inoperative since 1933, as has that of Michigan since 1935. Both were active during their first biennium. The council in Virginia presented five excellent reports to

<sup>1</sup> John M. Gaus, "The Wisconsin Executive Council," *American Political Science Review*, 26: 914-920, Oct. 1932.

<sup>2</sup> Kansas, *Laws of 1933*, ch. 207; Franklin Corrick, "Previews (of the Legislative Council)," *State Government*, Nov. 1934, 250-252; Camden S. Strain, "The Kansas Legislative Council," *American Political Science Review*, 27: 800-803, Oct. 1933; Michigan, *Public Acts*, 1933, No. 206; and Harold M. Dorr, "A Legislative Council for Michigan," *American Pol. Sci. Rev.*, 28: 270-275, April 1934.

<sup>3</sup> Virginia, *Public Acts*, 1936, ch. 170; and *State Government*, June 1936, 132.

<sup>4</sup> Kentucky, First Special Session of 1936, Art. XXI, ch. 1.

<sup>5</sup> Bryant Putney, "Legislative Councils," *Editorial Research Report* No. 6, II, Aug. 1937.

the 1936 session, and the one in Kentucky was successful in preparing a legislative program of eleven bills for the special session of 1937.<sup>6</sup>

The fundamental purpose in the creation of a legislative council is the preparation of a program for the next legislative session. The reasons for the creation of such an agency have been variously stated,<sup>7</sup> but are fairly well summarized in the preamble to the Illinois law of 1937 which concludes:

Such legislative planning and formulation as actually obtains would, by being recognized and made properly antecedent to regular sessions, conserve legislative time, save unnecessary expense, improve ensuing debate, and restore legislative activity to the high place in government and public esteem which it merits.

#### ESSENTIALS OF THE KANSAS IDEA

The methods and accomplishments of the council cannot be understood unless there is thorough comprehension of several important features of the Kansas idea which are frequently misconstrued by the observer. The first is that the Kansas council is *legislative* and not executive, in actual operation as well as in name. The legislators have been working out the council idea in their own way, as something indigenous to legislative soil. The institution as it evolves may differ somewhat from a priori ideals, but will be more genuinely a legislative product and may prove better fitted to legislative ends. The real question, to which the Kansas council gives some promise of being the answer, is: Can the legislature work out its own salvation?

The Kansas idea of formulating a program has been that the selection of the solution must be reserved for final decision in full legislature, newly elected. The program has not been a positive recommendation of specified solutions, but rather explanation of alternatives, finding as

<sup>6</sup> In addition, Colorado in 1933 established a Committee on Interim Committees whose sub-committees report to the pre-session conference of legislators, and New Mexico in 1936 attempted a somewhat similar experiment.

Numerous proposals for councils were made for the 1937 legislative sessions, possibly the most interesting being that of the Cleveland Citizens' League, which advocated a large unicameral legislature with part of the membership designated as senators and elected specifically as a council between sessions.

<sup>7</sup> Model State Constitution, Sec. 29-32, National Municipal League, 3d revision, 1933; W. F. Willoughby, *Principles of Legislative Organization and Administration*, 657 pp., Washington: Institute for Government Research, Brookings Institution, 1934; A. E. Buck, *Modernizing Our State Legislatures*, 45 pp., Pam. Ser. No. 4, American Academy of Political and Social Science, 1936; Hubert R. Gallagher, "Legislative Councils," *National Municipal Review*, 24: 147-151, March 1935; *Report of the Connecticut Commission Concerning the Reorganization of the State Departments*, submitted to Governor, Jan. 25, 1937.

to facts; and as such, it has been adapted to legislative behavior more readily than any conclusions of a few council members could have been. Except in a few instances, even the bills recommended were tentative. The council expected them to be subject to amendment and compromise, and the accompanying factual material was as important as the bill itself. In other words, what the council has usually done has been to present comprehensive analysis of each situation.

Such a program clears the ground of much of the lost motion and confusion of the past. It economizes legislative time by freeing it from the burden of innumerable, ill-considered, freak, and surprise attempts at solution of major problems with inadequate information and without impartial analysis. Certainly the 1935 and 1937 sessions were more clear-sighted, less confused, because of the existence of the council. The council selects the important topics and provides the factual basis for clarifying issues, permitting the major worth-while alternatives to rise to the surface. The legislature, however, must assume responsibility for the final choice.

The council's program is of such a nature, in consequence, that neither the legislature nor the governor has ignored it or can ignore it. Not in the slightest is this because of any remarkable potency of the council's official recommendations. It is due, instead, solely to the fact that there has been provided a genuinely new bit of legislative machinery by means of which a legislative program is developed over a period of many months. When the council concludes its last meeting, the program is actually there, an established fact, written across the whole state, and by that time no fiat of council, governor, or legislature can make or unmake it.

Herein lies the peculiar contribution of the Kansas experiment—and its chief contrast to the small, executive-type council. The Kansas council evaluates the relative importance of public demand for action in various fields, and responds to that demand by analyzing those subjects which it considers most likely to be important before the session, regardless of whether or not it believes affirmative action desirable; and this the council has done well. The legislature and the governor may determine the emphasis to be given one part of the program as against another; they may disapprove or disagree on solutions or fail to take action; but the subjects sifted out by the council have proved to be the ones which did require consideration and decision in the legislative session.

The final essential is a well-staffed research department as indispensable for council success. Since the council's findings in its program are



primarily factual, it is imperative that the legislators have an impartial staff, under their own control, upon which they can fully rely. While it required nearly fourteen months for this to become evident, and several months more before the research work was accepted as sound and unprejudiced, few Kansas legislators, administrators, or observers would now believe it possible for the council to continue successfully without this staff.

#### THE LEGISLATOR AS COUNCIL MEMBER

The council idea is based on using legislators without any attempt to metamorphose them over night into a brain trust or guiding angels free from behavior normal to legislators. Two factors enable them to function as they could not during regular session. The first is the quarterly meeting, with freedom from rush and pressure; no necessity for immediate decision; concentration on fundamentals instead of upon detailed language of bills; opportunity to talk all subjects over for three months at home before returning; and time for further consideration spread over two years. There are no special local bills to push through. Log-rolling is gone. Nothing remains but major state problems. Second, there is the research staff, to do most of the detailed work for committees and members, to supplement with additional information at the next meeting, and ultimately to report to the legislature such additional information as the council may direct.

The council member nevertheless remains strictly a legislator. Many members will probably run for reelection or for another office. They are naturally contemplating the next campaign. They must also think in terms of their membership on regular committees, of the give and take which will normally result in the regular session. In consequence, legislators have definite limitations in planning a program to extend beyond two years. They are particularly fitted, however, to gauge accurately the program which will best meet the needs of the next session. In so doing they do not sit down to plan such a program deliberately. A few items are selected as the result of conscious effort. Many others are chosen in response to the very same stimuli to which legislators have always reacted.

#### THE COUNCIL IN OPERATION

Introduction of new subject matter before the council normally takes the form of a proposal, which is referred to a standing or special committee, although it may receive preliminary consideration immediately



upon introduction. These proposals consist of a very brief title indicating the general objective, and may be accompanied by further explanatory material. The proposal may be reported unfavorably at the same meeting, but usually all which seem to have any merit are referred to the research staff for preliminary statement or analysis of the facts. Some of these require extensive research. A progress report is usually presented at the next quarterly meeting and the preliminary and supplementary research reports are made available to all members, to all other legislators, and to a mailing list of over one thousand citizens throughout the state.

Between council meetings, the committees may function more or less actively. Some have designated a member to cooperate with the research staff, who may appear for conference with the staff from time to time. Others may maintain contact primarily through correspondence. While committees have held special meetings, their formal work is usually done during the council session. The rules provide that on final report the committee shall present a bill covering the subject, but as a matter of fact this is rarely done until the last two meetings immediately preceding the regular session.

Proposals come not only from members but also from recommendations from the governor, from other legislators, and as a result of petitions or correspondence from citizens. In consequence, the gross result of council endeavor is somewhat akin to the regular legislative situation. Proposals are thrown in from all quarters. Attention is focused and information is provided by the committee reports and by the discussion thereon. General council interest in any one of the proposals as a part of the final program is a development from this procedure rather than the result of conscious planning. Committees and the council itself act as sifting agencies, first to eliminate various proposals and second to analyze the remainder. The program which finally evolves is the net result of the combined efforts of all members of the council.

#### COUNCIL ACTIVITY BETWEEN MEETINGS

General council activity is not much in evidence between meetings, aside from the work which the research staff may be doing under committee instruction. The individual member, however, serves a very definite function, which even he frequently fails to realize. He has heard the proposals, received the factual material, and listened to committee reports and to discussion in the debate following. On returning home there is ready at hand material to which he can easily turn for

speeches over his district or for day-by-day discussion with constituents. That is, the council member spreads over his district, more intimately and in more detail than the press reports, what has been picked up at the council meeting. The essentials of the program thus begin to take preliminary shape. In addition, the legislator who is not a member, but who receives all the reports submitted, is similarly able to use the material as questions arise.

This almost invisible function, this dissemination of preliminary reports and factual material at the outset of popular consideration of the general problem, is perhaps one of the most valuable contributions which the council makes towards a legislative program. A gradual assimilation of such information and discussion goes on from one meeting to another. By this process the council is finally confirmed in its decision to proceed further, or is satisfied that as much has been done as is needed for the moment. It is in this manner that there is laid the foundation for a sound legislative program in the regular session. An important part of the work is accomplished long before the council submits a formal report to the legislature.

#### RELATION OF COUNCIL TO THE LEGISLATURE

The council is in fact, and in improved form, a perpetual interim committee for the legislature, always available to institute a study of a new subject, with full power to secure the necessary information, directing its attention at once to matters of immediate public interest. This timeliness of consideration is no small factor in bringing the council's work before the people over the state while their interest and attention is focused on a particular problem.

Dumping of reports upon the busy first days of the regular session, the usual practice of interim commissions, imposes a task of assimilation which the ordinary legislator usually refuses to assume, or which delays the session if he must give time to it. The ability of the council to make reports more than a year in advance of the session, or preliminary statements indicating the scope of final reports, prepares the legislature for their reception. In consequence, these reports (not the formal summary report in December, but those issued over the two years) have been used immediately. In advancing legislative and popular understanding of the problem and the probability of immediate constructive steps in the next session, the council has been much more successful than most interim commissions of the past.

This new agency is not a group of specialists or experts, nor do its

members pretend to be wiser than other legislators. It is as much a regular committee of the legislature as any other standing committee. Nevertheless, it is difficult as yet to avoid some feeling of natural jealousy which arises when a small part of the legislature is set apart as a "council." Many important members of the legislature cannot be appointed thereon if geographic, party, and other representative groupings are to be given proper weight. It must be borne in mind that there is much leadership in the new blood in the legislature. Also, new members coming fresh from the election feel that they have as much a mandate from their constituents as any other member of the legislature. They want to make a showing, to have equal voice in committee and on the floor. They would not willingly tolerate such a legislative organization if it undermined their own legislative standing.

By making its work immediately available and distinctly helpful to other legislators, old and new, the Kansas council has adjusted its relationship to the legislature to accord with this situation and with the psychological factors behind it.

While the individual member who returns to the regular session (eighteen in number in 1935 and twelve in 1937) lays no claim to greater authority because of council membership, nevertheless the fact that he may have participated in six or seven quarterly sessions, with a mass of factual material before him and careful discussion of the various problems over this period, does enable him to be better informed than many other members of the legislature. He is in the strategic position, though frequently unwittingly, of requiring others to meet him upon the same factual basis. He serves as an interpreter of the work of the council to other members of his committee and to the general legislative body, and is partly responsible, in consequence, for the prestige of the research reports. In this he is not alone, for other legislators, not on the council, have also had access to material, and many of them may be as well informed. If chairmen of council committees return, they frequently play a very important part in developing the final program in standing committees, on the floor and in the corridors.

#### REACTION TO RESEARCH REPORTS

The combination of council and research staff has brought about immediate, easy acceptance of research reports. The explanation seems to be threefold. First, the reaction of council members as legislators governs the research department in its selection and presentation of mate-

rial in its reports over a two-year period, which makes them of immediate value to the legislators.

Second, the council members become sponsors for the research and for the research staff. Familiarity in this case has not bred contempt, for the continuous association has developed mutual understanding. In addition, other legislators who have received the reports of the quarterly meetings at a time when there was leisure to consider them have themselves been able to make use of part of the material. The approbation of council members, combined with their own practical use of the material, brings such legislators to the session with an appreciation of research results.

A third significant fact is that the legislator who knows that research has been completed on a certain subject is most reluctant to enter legislative debate on that topic without being informed. In the 1935 session, when incorrect statements were immediately challenged by council members or by other legislators who had in their hands the research report giving the exact facts, the uninformed legislators found themselves in an embarrassing situation. One major result was the rather continuous use of council reports throughout the session. Such use of factual material and the extent to which legislative committees came to the research staff during the session for additional facts indicate clearly the value of the research function of the council and its staff.

#### THE COUNCIL AND THE GOVERNOR

In Connecticut the governor is a member of the council; in Virginia he appoints all the members, although five must be from the legislature; in Wisconsin and Kentucky he appoints part of the membership from outside the legislature. Only in Kansas, Michigan, Nebraska, and Illinois are the councils entirely under legislative control. The two types of experiment, while allied in purpose, may work rather differently in actual operation.

Both Kansas governors have been skeptical of the quarterly appearance at the state house of representatives of the legislature, with full power to open any subject for discussion. However, the council thus far has kept its feet securely on the ground, and its treatment of inquiries into administration, for the most part, has been expertly handled. Although the Michigan governor in 1935 was antagonistic to the council and recommended the repeal of the Michigan law, there has been no reason in Kansas why a governor should oppose the council and its program.

The formal relation is maintained solely by messages from the governor, one at the opening of each new council and others recommending special topics as occasion arises. These have been few in number. Close contact is maintained precisely as it is during a regular session, through conferences with chairmen of committees or individual members, and the governor never loses touch with the council from meeting to meeting. In addition, there is another contact through the research staff, which is under instructions to work for the governor on his legislative program.

The presence of the council enables the governor to keep in closer touch with the possible legislative program than he could if such an agency did not exist. The governor may ignore or take a definite stand on some of the alternatives presented in the program, or even add other topics to the list. He can rely upon the factual presentation of alternatives and use that material in reaching his choice for specific recommendation. In consequence, the council's work may be as beneficial to the governor as to the legislature.

#### PRESENT STATUS OF THE KANSAS COUNCIL

Those informed will probably agree that the Kansas council has been genuinely helpful to the legislature; that it prepared ample material for the presentation of programs to the 1935 and 1937 regular sessions; and that it has grown steadily in prestige with the legislature and with the general public. It seems clear to the writer, although others may not agree, that actually, in its brief four years, the council has already become an integral part of legislative machinery.

Certainly the net result of the council's labors has been a distinct gain. A comprehensive program was available for the special session of 1933, and 60 per cent of the bills recommended were passed. No interim committee reports in Kansas had ever before been of such immediate assistance or played so direct a part in the passage of legislation as did the council reports to the 1935 and 1937 sessions.<sup>8</sup> In both sessions, the legislature actually placed major emphasis upon those items which the council had considered. The council even anticipated most of the major items in the governor's program, despite the unforeseen political overturn which occurred in the 1936 election.

<sup>8</sup> For additional analysis by author, see: "Accomplishments of the Kansas Legislative Council," *American Political Science Review*, 29: 636-639, Aug. 1935; "Kansas' Experiment with a Legislative Council," Publication No. 42, Research Department Kansas Legislative Council, Aug. 1936, mimeo. 10.

Experienced legislators believed reduction in legislative time was a direct result of council activity. Many believe the evidence shows that the new institution made positive accomplishments in its first two terms sufficient to warrant optimism for its future. The chief test at this time is a simple one—merely whether the council is meeting a genuine need and whether the end result, by and large, is a substantial gain. Despite misunderstandings and misconceptions, the answer to this in Kansas has been affirmative.



## CHAPTER XXII

### THE GOVERNOR

#### 128. SPECIAL MESSAGE OF THE GOVERNOR

At the opening of the regular session of the legislature, which usually meets biennially, it is customary for the governor to present to the legislature, either in the form of a written message or personal address, his recommendations for legislation together with a survey of the condition of affairs in the state. He may also at any time during the session send a special message to the legislature regarding some particular matter. The following selection is an example of such a special message.

[*Illinois Senate Journal*, 1925, p. 389.]

State of Illinois,  
Executive Department,  
Springfield.

*To the Members of the Fifty-fourth General Assembly:*

In compliance with the provisions of an Act approved on March 7, 1917, otherwise known as the Civil Administrative Code of Illinois, I transmit for the consideration of the General Assembly the Fourth State Budget.

This budget embraces the sums which I recommend to be appropriated for the respective code departments, offices and institutions, for use during the two fiscal years beginning July 1, 1925 and ending June 30, 1927. It includes also the estimated revenues from taxation, the estimated revenues from sources other than taxation, and an estimate of the amount required to be raised by taxation.

As required by law, I am transmitting in this budget the estimates of receipts and expenditures received by the Director of Finance from the elective officers in the executive and judicial departments and from the University of Illinois.

Respectfully submitted,

LEN SMALL.

Feb. 4, 1925.

## 129. CALL FOR A SPECIAL SESSION

The time for the meeting of regular sessions of the legislature is fixed by the state Constitution, but, at other times, the governor may issue a proclamation convening the legislature in extraordinary session. In a considerable number of the states, the legislature is limited at such special session to a consideration of the subjects mentioned in the Governor's call; hence, in his proclamation he usually states the matters upon which he desires legislative action at such session. These may be very few in number or they may be quite numerous, as in the following example.

*[Journal of the Senate of the Second Special Session of the Forty-ninth General Assembly of the State of Illinois, 1916, pp. 1-2.]*

## PROCLAMATION

State of Illinois  
City of Springfield.

Executive Department.

January 7, 1916.

*To the Members of the Forty-ninth General Assembly:*

Whereas, An extraordinary occasion has arisen in the administration of the affairs of the State Government of this State, necessitating an extraordinary session of the General Assembly:

Now, Therefore, I, Edward F. Dunne, Governor of the State of Illinois, do, by virtue of the authority vested in me by section 8, article 5, of the Constitution, convene the Forty-ninth General Assembly to meet in extraordinary session on the eleventh day of January, A. D. 1916, at 12 o'clock, noon, at the State House, in Springfield, Illinois, for the transaction of the following business, viz.:

(1) To enact laws to validate and legalize any and all elections and proceedings for the issuance of bonds for the purpose of constructing, maintaining or repairing, or aiding in the construction, maintenance or repair of roads and bridges, in any and all cases where a majority of the legal voters of any county, township, road district or municipality of this State, voting upon the proposition to issue such bonds, have voted in favor thereof; also to validate and legalize any and all such bonds which have been or may hereafter be issued in pursuance of such elections and proceedings; also to legalize and validate any bonds or obligations so voted for the purpose of obtaining money to be used for, or to aid in, the improvement, in any manner, of any public highways in this State; also to validate and legalize any and all taxes levied, or to be hereafter levied and collected, for the payment of the principal of, and interest on, any and all such bonds.

(2) To enact laws creating a commission which shall be empowered to arrange for and conduct a celebration in honor of the centennial of the admission of the State of Illinois to the Federal Union, and to make an appropriation therefor.

(3) To enact a law providing for the salary of the Secretary and Chief Examiner of the State Civil Service Commission, and to repeal all laws in conflict therewith.

(4) To enact laws making appropriations to compensate owners of live stock destroyed on account of being affected with or having been exposed to the contagion of foot-and-mouth disease, and to pay the expenses of quarantine and disinfecting premises, and all other expenses incurred in enforcing the law for the eradication of the foot-and-mouth disease among domestic animals.

(5) To enact laws making appropriations to pay the officers, employees, members and other necessary expenses of the second special session of the Forty-ninth General Assembly.

(6) To enact a law making further and additional appropriations for the Illinois Free Employment Offices in Chicago.

(7) To enact a law amending an Act entitled, "An Act to provide for the holding of primary elections by political parties," approved March 9th, 1910, in force July 1, 1910, as subsequently amended by amending section 43 thereof.

(8) To enact a law to govern the sale, distribution and use of anti-hog-cholera serum, hog cholera virus and other biological products within the State.

(9) To enact a law amending an Act entitled, "An Act to provide for the holding of primary elections by political parties for the nomination of members of the General Assembly and the election of Senatorial Committeemen," approved March 9th, 1910, in force July 1, 1910, as subsequently amended.

(10) To enact a law amending an Act entitled "An Act to provide for the election and time of election of judges of the Superior Court of Cook County," approved June 5, 1911, in force July 1, 1911.

(11) To enact a law amending an Act entitled "An Act to provide for the printing and distribution of ballots at public expense and for the nomination of candidates for public offices, to regulate the manner of holding elections, and to enforce the secrecy of the ballot," approved June 22, 1891, in force July 1, 1891, as subsequently amended.

(12) To amend the law passed at the first special session of the Forty-ninth General Assembly authorizing the appointment of a commission to examine into the operation of all pension laws heretofore en-

acted in this State and to amend the law making appropriation for said commission or to enact a law creating such a commission and providing an appropriation therefor.

E. F. DUNNE, *Governor*.

By the Governor:

LEWIS G. STEVENSON,  
*Secretary of State.*

### 130. THE ITEM VETO AND THE BUDGET SYSTEM

In addition to the ordinary veto, the governor has in many states been given the power to veto separate items in appropriation bills. This item veto was introduced into the states prior to the development of the general movement for the budget system. Since the adoption of the latter, the item veto has not become obsolete, but its purposes have undergone a change. In the first of the two following selections, an example of the actual exercise by the governor of his item veto is given, while, in the second selection, the relations between the item veto and the budget system are explained.

#### a. Exercise of Item Veto

[*Illinois House Journal*, 1921, pp. 1477-1478.]

State of Illinois,  
Executive Department,  
Springfield, June 30, 1921.

*To the Honorable, the House of Representatives:*

I return herewith House Bill No. 333, entitled, "An Act making appropriations for the University of Illinois and providing for the expenditure thereof."

I veto, and withhold my approval from the following items therein contained:

Page 2, section 1, lines 7 and 8 from the top of the page: "For improvements other than new buildings .....	320,000."
Page 2, section 1, line 9 from the top of the page, "For contingencies .....	320,000."
Page 3, section 3, lines 3 and 4 from the top of the page: "For first unit of Library building and equipment .....	500,000."
Page 3, section 3, line 10 from the top of the page: "For addition to Armory .....	250,000."
Page 3, section 3, line 11 from the top of the page: "For Cattle Feeding Plant .....	50,000."
Page 3, section 3, line 12 from the top of the page: "For Land .....	150,000."
Page 3, section 3, line 13 from the top of the page: "For Contingent Building Fund .....	50,000."

I submit as reason for my veto of these items the following: The Fifty-first General Assembly appropriated to the University of Illinois the sum of \$5,348,000. The appropriation contained in House Bill No. 333 aggregates \$10,565,000, which is an increase of almost 100 per cent. Even after these items have been vetoed, the increase over the last appropriation is approximately 80 per cent.

In addition to House Bill No. 333, the Fifty-second General Assembly has also appropriated \$100,000, to be received from the Federal Government, and has reappropriated \$185,265. This is a greater increase than has been allowed by the Fifty-second General Assembly to any other division, branch or agency of the State government.

I believe that this increase will be found ample to supply the growing needs of the State university and will provide for as many buildings as the University of Illinois can economically construct before the next session of the Legislature.

Respectfully submitted,

LEN. SMALL, *Governor of Illinois.*

#### b. Item Veto and State Budget

[R. H. Wells, "The Item Veto and State Budget Reform," *American Political Science Review*, vol. XVIII, pp. 782-791 (Nov., 1924).]

The movement for budget reform has now reached a point where every state, except Missouri, has enacted some kind of budget legislation. An excellent historical approach to this reform lies in a study of the governor's veto power, particularly his authority to veto items of appropriation. Accordingly, the following article outlines the development of the item veto and indicates its present relation to the budgetary provisions of the states. . . . Originally, the primary purpose of the item negative in the states was to prevent improper or unconstitutional appropriations rather than to restrain expenditures which were merely excessive in amount. This purpose has, in the main, been successfully accomplished. But in time, owing to the increasing cost of government and the extravagant habits of legislatures, the original intent of the item veto has become subordinated to a demand that the governor extensively use his veto authority as a means of compelling the state to live within its income. Under such circumstances, the item veto began to disclose serious defects, the nature of which will be indicated later.

The growing realization of these defects led to reforms along several lines, the most important of which was the state budget movement. Earlier and quite apart from any budgetary legislation, the scope of the



item veto was extended in Pennsylvania. Starting in 1885, the governors of that state, without specific constitutional authority, began to reduce items of appropriation with a view to checking improper itemization by the legislature. Thus, it was no longer possible for that body to prevent the use of the item negative by putting necessary and unnecessary expenditures together in lump-sum items. In 1901, this practice was upheld by the state supreme court and thenceforth was employed on a large scale. . . . The few bills and items which received executive action before adjournment were mainly emergency and deficiency acts. Since a veto after adjournment is not subject to legislative review, it may be affirmed that, under the conditions prevailing up to the passage of the budget act of 1923, the governor of Pennsylvania had an absolute negative over the expenditures of the state. The legislature appropriated recklessly and went home, leaving the executive to make ends meet by whatever reductions he thought proper.

As previously stated, the Pennsylvania plan was evolved prior to any budget reform. Ten or fifteen years ago, it had considerable popularity and many governors and publicists advocated the enlargement of the item veto so as to permit the reduction of items. Moreover, in about a dozen states, besides Pennsylvania, the governors attempted to reduce items or to disapprove parts of items. Their efforts, however, were not very successful because the courts, in the absence of specific constitutional authority, were inclined to hold such action void, and because the item veto, both in its original and modified forms, was rather generally opposed by the new school of budget reformers which was developing about the same time.

It now remains to speak of the state budget movement and of its effect upon the veto power. In lieu of Pennsylvania's modified item negative, the budget advocates presented a counter proposal which found complete expression in the New York budget provision of 1915 (rejected by the voters) and in the Maryland budget amendment of 1916. According to the budget reformers, the veto and the item veto as applied to appropriation bills were illogical and ineffective. They were illogical because they reversed the relation which should exist between the governor and the legislature. Instead of the executive initiating appropriations subject to the revision of the legislative department, which was supposed to control the purse, the opposite situations prevailed. The veto and the item veto were ineffective because responsibility for expenditures was divided. They encouraged extravagance on the part of the law-making branch so that it came to rely upon the governor to make ends meet. Moreover, it was not enough for the executive merely to negative large



sums. What was often needed was a general reduction all along the line, and it was not easy to secure a balanced outlay simply by disapproving a bill or an item here and there. Finally, in many states, the major appropriation acts were generally passed at the end of the session. If executive action on them was required before adjournment, the governor had too little time for careful scrutiny; on the other hand, if he was allowed to negative appropriation measures and items after adjournment, his veto was usually final. It was subject neither to legislative reconsideration nor to adequate public criticism, and it might be used to reward or punish members of the legislature through the approval or disapproval of "pork" projects.

Such criticisms made it increasingly clear that the veto and the item veto, when used alone, were insufficient to cope with the mounting costs of state government. An era of efficiency and economy commissions helped to focus attention on this fact as well as on the need of administrative reorganization. The outcome was a budget reform movement which swept the country and led to the enactment of budgetary legislation in forty-seven states. It is not the purpose of this article to analyze this legislation. The main question now under consideration is, "What has been the effect of the recent movement on the governor's veto power and especially on the item veto?" Obviously, the effect will vary widely in the different states. Nevertheless, the state budget systems may be classified into three groups: those established by legislative act—thirty-one states—which, in form, do not affect the constitutional provisions governing the item veto, but which, in fact, may affect the operation of the item veto; those based on constitutional amendment—Maryland, West Virginia, Nebraska—which specifically curtail the scope of the item veto; and those based on constitutional amendment—Massachusetts, California—which specifically enlarge the scope of the item veto.

The budget systems of the first group may affect the use of the item veto in two ways. If the law requires the governor to prepare the budget, he has a renewed incentive to use his veto authority as a means of defending his proposals against legislative additions. Under such circumstances, it is easy for him to disapprove special appropriation bills initiated by the legislature and new items added by that body. On the other hand, the executive has no direct power to prevent increases in the items originally submitted. The simplest remedy for this difficulty is to enlarge the item veto so as to allow the reduction of items. This step is not objectionable provided it is made an integral part of an adequate executive budget plan and not, as in Pennsylvania, an isolated and irresponsible instrument of financial control. A second effect of

statutory budget systems has been to secure the enactment of the major appropriation measures long enough before adjournment so that any items disapproved therein are subject to legislative reconsideration. Thus, the item veto is made suspensive in fact as well as in theory whereas, too often under the old regime, it was absolute in fact. This speeding-up process is well illustrated by the experience of New York under the budget act of 1916. Before the passage of that act, the item veto was chiefly used after the legislature had adjourned; since then, it has been mainly exercised during the session. From 1899 to 1917, the governors of New York disapproved a total of 121 items before adjournment and 1901 after adjournment; from 1917 to 1924, they negatived 391 items before adjournment and only 7 afterwards. In this connection, it may be noted that, in 1917, 4 items were repassed over the governor's veto, the first time such a thing had ever occurred in that state. A further consequence of the New York budget legislation has been to shorten the time for the executive consideration of items, since the governor has only ten days during the session as opposed to thirty days after adjournment. The result is similar in some of the other states, particularly in those where the legislature must enact the budget bill before any additional appropriation measures are considered.

Turning now to the second group of states, the operation of Maryland's executive budget plan is of chief interest. The Maryland budget amendment of 1916 has the practical effect of taking the item veto from the governor and vesting it in the legislature. Under this amendment, virtually all appropriations are initiated by the governor and presented to the legislature in his budget bill. For the most part the legislature can only strike out or reduce items in that bill. Hence, there is little point in applying the executive veto to the budget act which, therefore, becomes law without further action by the governor. After the final enactment of the budget, the legislature is permitted a narrowly restricted power to pass special appropriation measures for particular purposes, but these are still subject to veto. The results of the Maryland budget system are indeed striking. In the 1918 budget bill, the legislature struck out only two small items and approved the rest as submitted. The general assembly then managed to pass eight insignificant special appropriation acts, of which the governor vetoed one and reduced one. In 1920, the budget was adopted without change by the legislature which, thereupon, proceeded to enact six other appropriation bills, all of which were negatived. The governor also disapproved 64 highway bills which sought to impose future obligations on the treasury. The general assembly of 1922, a more critical body than its predecessors of 1918 and

1920, struck out 18 items in the budget bill, reduced 93 others, and increased 64 items for judicial salaries. On the other hand, but one act carrying a specific appropriation (\$1500) was passed and this was signed by the governor.

The experience of Maryland during these years shows the effect of a thorough-going executive budget on the veto power. Since the budget bill is the only one likely to contain itemized appropriations, and since the governor may not disapprove it in whole or in part, it follows that the item veto is practically obsolete. However, the veto of special appropriation measures may be used to keep the budget totals from being exceeded and this helps to explain why such measures have been so few in number. Moreover, after the budget is passed, there is little time left for additional legislative appropriations. It is, therefore, apparent that the veto power in Maryland has become less important as a check upon expenditure. Its chief value now is in preventing the legislature from creating new offices and authorizing new undertakings which, if sanctioned, would necessitate future appropriations.

The enlarged item veto of Pennsylvania and the Maryland executive budget plan are both extreme in the degree to which they permit the governor to control appropriations. Massachusetts and California have sought a more moderate solution of the problem. Under the Massachusetts amendment of 1918, the governor prepares and submits the budget accompanied by a general appropriation bill. Until this bill has been enacted, the legislature is forbidden to pass any special appropriation measures unless recommended by the governor or for purely legislative expenses. On the other hand, the general court has full power to "increase, decrease, add, or omit items in the budget," while the executive is authorized to "disapprove or reduce items or parts of items in any bill appropriating money." The item veto had not existed in Massachusetts before 1918, but, in introducing it as a part of the executive budget machinery, that state unconsciously went back to the original Confederate model, a model which sought to give the executive adequate control over expenditure without too greatly curtailing the power and usefulness of the legislature.

The results of the Massachusetts budget system may now be summarized. From 1919 to 1923 inclusive, no items or parts of items were negatived or reduced by the governor. On the contrary, it was the general court which exercised a veto power over the executive budget estimates. Thus, the legislature struck out 19 items in the 1920 budget, 24 items in the 1921 budget, and 18 items in the 1922 budget. Some items were reduced, others were increased, and a few new items were

added against the wishes of the governor who, nevertheless, refrained from disapproving these additions. In every year, the total amount appropriated was less than the total proposed by the executive. In each year, appropriations in addition to those contained in the original budget were made, but these were usually based either upon the supplementary budgets submitted by the governor or upon recommendations in his messages. These supplementary appropriations were enacted in relatively few bills, never exceeding seven per session. No special or private appropriation acts were vetoed by the governor. However, this does not mean that the general court entirely neglected pet schemes. Some of these were incorporated in the general appropriation act or in the supplementary bills, but the governor did not attempt to disapprove them. Others were passed without carrying specific appropriations. At each session, there were a few measures enacted which sought to impose future financial obligations on the state; ten of these were negated as a means of sustaining the budget proposals. On the whole, the Massachusetts budget system has been a success. The governor has done careful work in revising and reducing the original departmental estimates sent to him. On receiving the budget, the general court has carried the reduction process still further so that there was little occasion to use the veto power on the appropriation bills as they were passed by the two houses. Although the estimates submitted are only tentative and might be altered beyond recognition by the legislature, this has not happened, for that body through its committees has handled the budget in an efficient manner. Were this not the case, the governor probably would have made a more extensive use of his veto power than was done. The mere fact that no items were disapproved or reduced and that no bills carrying specific appropriation were negated does not prove that the veto prerogative has no place in the budget machinery. Perhaps in the future, there will be a pronounced conflict between the legislature and the executive on the subject of finance. If so, the veto and the item veto will enable the governor to force the general court to reconsider and to assume full responsibility for any budget changes which it has made.

In view of the results obtained under the several types of budget systems heretofore discussed, what shall be said in conclusion concerning the future of the item veto? It seems clear that both the veto and the item veto should be essential parts of a properly adjusted budget plan such as that existing in Massachusetts. Although the item negative in the states has outgrown its original purpose, it should not be abolished but should be retained and enlarged so as to allow the reduction of



items. This, together with the ordinary veto, will afford the governor sufficient means for the protection of his estimates and, at the same time, will make unnecessary such a drastic curtailment of the legislature's power over finance as is found in Maryland. It is desirable that future budget developments in the states should be according to the principles first tried out in the Confederate States and more recently elaborated by the experience of Massachusetts and California.

### 131. INITIATIVE IN LEGISLATION

In 1913 a rule was adopted by the house of representatives of the Illinois General Assembly, which was a significant innovation in the direction of executive leadership in respect to legislation, and which, although since abandoned as a formal rule, represents a general and growing practice in state legislative procedure. Other proposals have been made during more recent years to bring the governor and legislature into closer relationship, which have also generally included a larger initiative and responsibility of the governor in the development of legislative policy. The actual position of the governor in this respect cannot, however, be fully appreciated by a mere reading of constitutions, laws, and rules, whether proposed or in effect. Like the President, he exercises a considerable amount of power as a result of his personal and political influence, and this greatly strengthens his position also in the field of legislation.

#### a. Administration Measures in Illinois

[Morton D. Hull, in *American Political Science Review*, vol. VII, pp. 239-240 (May, 1913).]

"When any bill or resolution is introduced for the purpose of carrying into effect any recommendation of the Governor, it may by executive message addressed to the Speaker of the House be made an administration measure. An administration measure may be sent to the appropriate Committee or it shall, upon request of its introducer, be sent to Committee of the Whole House. When such a measure has been reported out of Committee, it shall have precedence in the consideration of the House over all other measures except appropriation bills. The House shall sit in Committee of the Whole for the consideration of administration measures on Tuesday morning immediately after the reading of the House Journal."

The purpose of this rule is obvious. It is intended to give assurance to the governor that measures which he recommends will be given fair consideration and by such assurance to impose on him the obligation to have a legislative program. By so doing, it is hoped to give greater significance to party platforms and make in some small degree for party responsibility and party government.

It will be noticed that an administration measure *shall* be sent to the committee of the whole house upon request of its introducer. It is therefore mandatory so far as the rules are concerned that it be sent there on the request of the introducer. In practice the introducer will look over the standing committee to which the bill might otherwise be sent, and if he considers the personnel of the standing committee hostile to his measure will ask that it go to committee of the whole house. If the standing committee in question is favorably inclined he may prefer to have the bill go to such committee, especially if there is already a congestion of business before the committee of the whole house. Either method is open to him.

It will further be noticed that the rule sets a definite time, viz., Tuesday mornings, usually the time when the attendance is largest for consideration of administration measures. This is but recognizing that under a proper system of party government administration measures ought to be the main matters for legislative consideration. The constitution of Illinois, like the constitution of most States, requires that the governor shall make recommendations to the legislature of necessary legislation. Political practice also recognizes the chief executive as the party leader. It is right and proper, therefore, that having the obligation of making recommendations to the legislature and being recognized as the party leader, he should have the right to have his recommendations considered—if need be even to the exclusion of other measures.

The rule is a distinct innovation in American legislative practice and has its precedent in the English parliamentary practice which gives to "government bills," as they are called, precedence over "private members' bills." It but recognizes what is everywhere beginning to be recognized that the American separation of the executive and legislative departments of government is artificial and not in accord with the way in which men must act together in political parties under responsible leadership, unless popular government is to degenerate into drifting currents of chaos and confusion whipped hither and thither by irresponsible demagogues.

While the new rule follows an English precedent and it is hoped will help to make for party responsibility, the practice of English parliamentary government, which puts the English party leaders on the floor of the legislature to introduce and guide legislation is, of course, lacking. In this connection it is interesting to call attention to the recommendation made by ex-President Taft in a recent public speech that the members of the President's cabinet should be given seats in Congress. Even more



significant is the proposed constitutional amendment which was submitted to the voters of Oregon at the last election and I believe defeated, which provided for the consolidation of the two houses of the Oregon legislature into one, and which put the governor on the floor of the new legislative body with the right and duty to initiate legislation. . . .

### b. Model Constitution Plan

[Model State Constitution, prepared by Committee on State Government of the National Municipal League (third revision), in *Constitutions of the States and United States* (compiled for the New York State Constitutional Convention, 1938, by Rodney L. Mott and Wilbert L. Hindman), pp. 1818-1821.]

[Section 13 provides for a unicameral legislature.]

SEC. 29. There shall be a legislative council, consisting of the Governor and seven members chosen by and from the legislature. . . .

[Section 31 provides that the legislative council shall collect information, prepare legislation, introduce bills, and make recommendations.]

SEC. 46. The Governor and heads of executive departments shall be entitled to seats in the Legislature, may introduce bills therein, and take part in the discussion of measures, but shall have no vote.

SEC. 49. Within one week after the organization of the Legislature, at each regular session, the Governor shall submit to the Legislature a budget setting forth a complete plan of proposed expenditures and anticipated income of all departments, offices and agencies of the State for the next ensuing fiscal year (or biennium). . . . At the time of submitting the budget to the Legislature the Governor shall introduce therein a general appropriation bill containing all the proposed expenditures set forth in the budget. At the same time he shall introduce in the Legislature a bill or bills covering all recommendations in the budget for additional revenues or borrowings by which the proposed expenditures are to be met. . . . The Legislature shall provide for one or more public hearings on the budget, either before a committee or before the entire Assembly in committee of the whole. When requested by not less than one-fifth of the members of the Legislature, it shall be the duty of the Governor to appear in person or by a designated representative before a committee thereof, to answer any inquiries with respect to the budget. . . .

### 132. THE OVERBURDENED GOVERNOR

In the first of the following selections the governor of New York gives a graphic account from actual experience of how a governor is overburdened with a host of unnecessary details which consume his time and strength and prevent adequate consideration of large questions of policy. In the second selection a suggestion is made to remedy this situation by making the lieutenant governor a sort of deputy governor to relieve the governor of much of this detailed work.

#### a. Governor Alfred E. Smith, on "How We Ruin Our Governors"

[*National Municipal Review*, vol. X, pp. 277-280 (May, 1921).]

How long would any great corporation live if the man directing its affairs was compelled to spend 75 per cent of his time doing clerical work, signing papers, listening to reports that might well be directed to a competent subordinate? Can you imagine Judge Gary of the Steel Trust, signing three copies of every lease that that corporation makes? Can you imagine him reading over the contract for the removal of ashes from one of the plants? Can you imagine him signing hundreds and hundreds of papers that might well be signed by the attorney of the corporation or by a vice-president or some equally responsible individual?

Theoretically the governor is the head of the government. He is supposed to plan the broad administrative policy. People think that he deals with large affairs. As a matter of fact his energy is consumed by trivial details of a clerical or subordinate nature. There is little time and strength left for the high functions of his office. In addition to the reorganization of administrative departments to give him easy control and supervision over executive affairs, the governor must be relieved from scores of petty duties which demand his attention at serious detriment to his work for the people.

The most annoying duty that is placed upon the governor is his chairmanship of the trustees of public buildings. The capitol and agricultural hall in Albany are directly under the control of the trustees of public buildings, and the law contains a provision that all leases made between the state and the various landlords must be executed by the trustees of public buildings.

The trustees consist of the governor, the lieutenant governor and the speaker of the assembly. It has been the fact for years that these three men come from widely different parts of the state. For the most trivial things the governor must call these men, after the adjournment of the legislature, from their homes to attend meetings for routine business.

The superintendent of the capitol should have some of the power now

reposing in the trustees. He should be empowered to dispose of useless furniture and fittings. As the law now stands he cannot dispose of a broken desk or a broken chair (I had to confer over some desks worth \$1.25 each) without the consent of the trustees of public buildings. They have to award all contracts, and before the contract to take the ashes out of the power house can be renewed the trustees must meet and pass upon that solemn proposition.

The state makes hundreds of leases in various cities for branches of the different state departments. Even for the small gas testing station required by the public service commission, the rental of which may be only twenty dollars a month, the governor and other trustees must sign three copies of each lease. Before part payments can be made for contracts for repairs to the capitol the trustees must approve, although the determination of the matter is naturally in control of the state architect.

If a room is to be painted in the capitol or a new strip of carpet is to be laid, there must be a meeting of the trustees, and the work cannot progress until the governor lays aside his other duties and takes up for consideration the question of a few pots of paint.

The superintendent of buildings is so limited in his authority that he is really the janitor of the building, and seldom makes any important move without seeking the advice of the governor or his secretary, all of which takes considerable time. His powers should be amply extended. He should be given the same authority as other department heads. That would relieve the governor greatly.

The law requires that the governor sign all the parole sheets before men are liberated from the various prisons of the state, even after they have completed the minimum time for which they were sentenced. This is an absolutely useless proceeding. The governor can have no personal knowledge of it, and simply signs the sheets certified to him by the board of parole. They properly should be signed by the superintendent of prisons, he being in possession of all the records. They are brought before the governor, and without any knowledge of his own, and no opportunity of gaining any, he simply goes through the empty formality of signing them. They come with great frequency. Every time the board of parole meets, the lists are brought in. Not only must they be signed by the governor, but they must be attested by the secretary; thus the time of two busy men is taken up in a useless performance, which should be handled entirely by the superintendent of prisons.

In order that police officials appointed by railroad companies may have a state-wide power of arrest, some time ago the law was amended providing for their appointment by the governor. That means that large

stacks of certificates of appointment of railroad policemen are laid before the governor for his signature. He does not know the men he appoints, and has to rely upon the railroad as to their integrity and honesty when having conferred upon them by the governor the power of arrest. If such appointments are necessary (which is probable) by some state power, it certainly ought not to be in the hands of the governor. I have spent whole hours at a time writing my name to appointments of railroad policemen. These men should be appointed by the attorney-general who has deputies to assist him in his work. Unfortunately there is no deputy governor.

All applications for notaries public—and there are some 65,000 of them in the state—are sent to the executive chamber, making necessary a whole department in the governor's office for the handling of the applications. This function does not belong in the executive chamber. It should properly be either in the attorney-general's office or in the office of the secretary of state, where a large part of it might well be performed by deputies.

There is a provision of law which requires the governor to sign all contracts for repairs and betterments in the state hospitals—not only sign the contract, but also the architect's blue-prints. He knows nothing about it and signs them usually upon the recommendation of the state architect. The law ought to be amended so that they be signed by the architect himself, and if there must be any check on the architect, it certainly should be by somebody in a position to know something about it, and not the governor.

The act creating the state constabulary contains a provision that the constabulary are not to exercise their powers in case of strike or riot within the boundaries of an incorporated city without the consent of the governor. This provision operates to make the governor the police commissioner when troops are needed for the suppression of riots inside of cities.

The result of this has been to cause the governor not only annoyance in the daytime, but at night. I was frequently called out of bed at night by the officials of small cities asking for the assistance of the state constabulary. In a great many instances their troubles were imaginary.

I have in mind one particular case where I was called up in the night by one official of the government of a city asking for the constabulary and called up an hour later by another official of the same city advising me not to send them in. That made necessary a conference in the nighttime with the superintendent of the state police and we satisfied everybody by sending the men there in citizens' clothes.

There is another important matter that deserves serious attention, that might be easily remedied. It would require only legislative action, either by amendment to the rules, or if not, by amendment of the legislative law, to prevent the dumping of a large number of bills into the executive chamber, giving the governor only thirty days to consider them.

At the last session of the legislature I had 856 thirty-day bills. That meant that I was given only thirty days to consider 856 bills. A great many of them were purely local in character; a great many of them were bills empowering the court of claims to hear and audit claims against the state.

This could be remedied by an amendment to the rules of the senate and assembly prohibiting the passage of purely local bills after a certain date in the session, so that the legislature may pass its unimportant local bills in the early months of the session, leaving the calendars clear at the end of the session for a discussion of the large proposals that affect all the people of the state.

This procedure would also give to the governor plenty of time and opportunity, in the thirty-day-bill period, to study out the larger proposals, and not have his time and the time of his office force taken up in passing on little local matters.

My experience at the close of the last session showed me that the large number of bills left with me could not be intelligently disposed of unless I worked from 9.30 in the morning until 1 or 2 o'clock the following morning. It is too much of a strain to put on the governor, and leaves him useless for some time after.

There are numerous other small detail duties that fall upon the governor in dealing with the great number of boards and commissions that we have transacting the state's business. The governor would be greatly relieved by the passage of the constitutional amendments reducing the large number of boards and commissions to eighteen departments of government, presided over by men given by law the necessary power to transact all the business of their departments.

The governor is unable to deny to citizens of the state serving on boards and commissions without salary, an opportunity to present to him their views about what is going on in their different institutions. Nothing takes more of the governor's time than listening to the complaints about the management of various institutions, large and small, all of which detail ought to be up to a man charged with that duty and with no other. It is because of that condition that I had to make a special trip to Bedford Reformatory, following the recent newspaper stories of riot and disorder at that institution.

The total net result of a New York governor's too-plentiful duties is that the great, big, prominent questions that affect the welfare of a commonwealth of over 10,000,000 people are subordinated to the small, tiresome and irritating tasks that are put upon the governor by statute.

**b. Arch Mandel, on "How to Save Our Governors From Ruin"**

[*National Municipal Review*, vol. X, pp. 409-410 (Aug., 1921).]

Ex-Governor Smith of New York deplors the fact, and rightfully so, that governors are ruined by being obliged to attend personally to innumerable and unimportant details of administration. This complaint doubtless strikes a sympathetic chord in the minds of every contemporary and ex-governor in the Union.

The statement that "unfortunately there is no deputy governor" made by Governor Smith in his article on "How We Ruin Our Governors" brings sharply to our attention an absurd tradition in the organization of our states and nation. New York State, and all other states have deputy governors, or lieutenant governors, as they are called, but for all practical purposes they might as well be non-existent.

In face of the burdens imposed upon governors in the administration of a commonwealth, lieutenant governors are pigeon-holed by being assigned the duties of presiding over senates and gracing public functions with their presence and speeches. Here are officers who could, if profitably employed, be of service to their states by releasing governors for their larger executive duties, and at the same time get things done for the state that governors, under present conditions, can only half do.

Furthermore, it must be borne in mind that all lieutenant governors are potentially governors; that when the occasion arises, and many such occasions have arisen, they must assume the office and duties of governor. Yet there is nothing in the duties performed by lieutenant governors that fits them to be chief executives of commonwealths. In fact, they are less fitted by training for this office than are chairmen of important legislative committees.

It must also be recognized that so long as the office of lieutenant governor carries with it nothing but an empty title, and is a blind alley politically, men of capacity and ability, men of large affairs who aspire to public service, will not seek the office nor will they have it thrust upon them.

Many of the ills described by Governor Smith will be corrected by the reorganization of the governmental machinery that tends to throw responsibility for getting things done upon a limited number of depart-



ment heads of ability. Yet the governor as the executive of the state, responsible for the proper administration of all departments and institutions, must of necessity give some attention to these problems. Even with the help of capable department heads the task of giving personal attention to large problems affecting the welfare of a few million persons and following the administration of state activities is too big for one man.

Recognizing these facts, Dr. Wm. H. Allen, of the Institute for Public Service, in his report on the reorganization of Michigan's state government, recommended two alternative solutions for "insuring preparedness to assume the duties of a deceased or removed governor while at the same time giving the state better government:

Alternative 1. The lieutenant governorship might be combined with the auditorship in one elective officer, in which case the senate should select its own chairman as the assembly now does.

Alternative 2. The lieutenant governor might be given five more duties besides that of presiding over the senate:

1. Visit every state department and activity at least once a year;
2. Serve as chairman of statutory investigating boards, like the board of corrections and charities, without power to vote except in case of tie;
3. Attend meetings of semi-judicial bodies, like the utilities commission, with power to question witnesses;
4. Review budget estimates;
5. Report to the legislature at the end of each biennium evidence gathered from his studies of forward steps taken, of inefficiency and extravagance observed, and of administrative and legislative changes needed."

Carrying out these recommendations would serve two purposes:

1. It would lighten the burden of the governor, who cannot carry out the duties of his office, no matter how hard working, conscientious and willing he is to do so.
2. It would insure states efficient and capable governors should the men elected to the office resign or die, or become incapacitated.

## CHAPTER XXIII

### STATE ADMINISTRATION

#### 133. ADMINISTRATIVE REORGANIZATION

Prior to 1917 Illinois, like most other states, had a cumbrous administrative machinery composed of a group of elective officers and over a hundred boards and commissions. In 1913 an Efficiency and Economy Committee was created which made an investigation and, in 1915, a report recommending the abolition and consolidation of numerous boards and commissions. Little was done to carry out these recommendations until 1917 when the legislative session of that year enacted the civil administrative code, which organized most of the state administrative work into nine departments, each under a director appointed by the governor. This was the most important step which up to that time had been taken by any American state towards administrative reorganization. The man who was probably most responsible for putting the civil administrative code through the legislature was Frank O. Lowden, governor of Illinois from 1917 to 1921. The example of Illinois was followed by several other states, including New York. In that state Governor Smith introduced also a form of cabinet which proved very useful.

##### a. Reorganization of State Administration in Illinois

[Frank O. Lowden, in *National Municipal Review*, vol. XV, pp. 8-13 (Jan., 1926).]

During the last century every great private industry has undergone a complete transformation. As civilization has become more complex the machinery of business has changed continuously to meet its changing needs. In the machinery of government alone progress has not kept apace with the needs. Yet the business of government has grown in complexity and in the number of subjects with which it deals quite as rapidly as has private enterprise. This failure has been due largely to the fact that until recent years the total expenses of government were so small relatively as to influence but little the general prosperity of the country. During political campaigns, parties frequently charged each other with extravagance, but the people were little interested because the revenues were largely derived from indirect sources and no burden was felt.

Now, however, state and federal taxes, by virtue of their weight, have become directly related to all economic questions of the day. Who can

doubt that the heavy taxes levied by government are an important factor in the high cost of living? The government is powerless to prevent a substantial part, at least, of such taxes being passed on to the consumer. We now see that no form of taxation has been devised which will be borne by the rich alone. The community as a whole, in one form or another, must pay the cost of government.

Business and industry generally, in making plans for the future, must reckon first with the question of taxes, which have reached the point where private initiative is discouraged and where enterprise in some cases halts.

Even before the war men were impressed by the continued increase in the expenses of city, state and national government. The activities of government have multiplied rapidly during recent years. When the state or nation had decided to take on some new function, instead of fitting it into some agency of government already established, it usually created an entirely new body. Sometimes it was an official; oftener it was a board or commission.

The commission had come to be a very popular form. It provided good places for aspirants to office, and, being a law unto itself, the members could attend to their private affairs and give one or two days a month—usually about the time the pay rolls were made up—to the public service. When once commissions were created it was almost impossible to abolish them. There is nothing more difficult in government than to get rid of a lucrative office once established. This practice had become quite general.

When I became governor of Illinois, in January, 1917, there were something over one hundred and twenty-five independent and unrelated agencies of the state government, sometimes composed of boards, sometimes commissions, and sometimes individual officials. In fact, so confused was the situation that no two agreed upon just exactly how many independent activities the state was conducting. Necessarily, this resulted in much overlapping of work. In purchases there was competition between the different agencies of the government, and there was, of course, needless expense. Above all, there was greatly reduced efficiency. In theory these various offices were supervised by the governor, but in fact it was absolutely impossible for him to exercise any adequate supervision over them. They were scattered over the state, frequent personal contact with them was out of the question, and for all practical purposes the state government was without an actual head. Energetic and competent administration was impossible.

One consequence of this haphazard method, or lack of method, of government was lack of law enforcement. Something went wrong or seemed to go wrong, and a law was enacted, and there the matter rested, as though the law were an end in itself. We were confronted with a problem requiring solution and then the legislature passed the problem on to a commission and felicitated itself that it had solved the problem. It is a grievous error to enact a law and then to disregard it. Even the best law badly administered is worse than none. For ours is a government of law. In America the sovereign power resides in the people, but the people speak only through the law. Whenever, therefore, law is disregarded, the sovereignty of the people is insulted, and no sovereign power, whether it be *demos* or king, can long rule unless it has the vigor and the will to vindicate itself.

The problem was to gather up the scattered agencies and to reorganize them into departments of government. Upon a study of the nature of these agencies, we concluded that they logically fell into nine groups. We then abolished the more than one hundred and twenty-five boards, commissions and independent offices, and created nine new departments, to take over their functions. These departments were: (1) finance, (2) agriculture, (3) labor, (4) mines and minerals, (5) public works and buildings, (6) public welfare, (7) public health, (8) trade and commerce, and (9) registration and education. The powers and duties of each department were defined by the code.

The question then arose as to whether these departments should be under the control of individuals or of commissions. In acquiring the habit of creating a board or a commission to take care of government work, we have assumed that if something important was to be done it would be best done if done by a body of men, and not an individual. The fact is—as all who have had experience in business of any kind know—that it is the individual who does things, not a board or a commission. There is no commission anywhere, there is no board anywhere, that does things affirmatively unless it is dominated by one man, and the only benefit from the other members of that body is in their advisory capacity.

Always it is an individual on the board or commission who takes the initiative, and the body is fortunate if the other members do not hamper him. I am speaking now of administration. A commission may be desirable where quasi-judicial or quasi-legislative powers are exercised. Where, however, the duties are purely or largely ministerial, experience has shown that it is a man, not a body of men, who gets results.

There are some who have assumed that large responsibility could be more safely deposited in a body of men than in a single man. Experience has not justified this. Where the responsibility is upon the individual, he cannot shirk it. Where it is placed in a body of men, the individual can find shelter behind that body, when called to account for the manner in which he has exercised his power.

There also is a deadly inertia in a board or commission which is not so likely to be found in the individual. It is a true saying that "what is everybody's business is nobody's business." It is equally true that where several members of a board or commission share a given responsibility, no one of them feels that responsibility as keenly as though he bore it alone. Good and efficient public service makes it mandatory that responsibility be fixed definitely. Then only can a public official be held to a strict accountability. Responsibility can be definitely placed only if it be reposed in an individual. For these reasons, in Illinois we placed at the head of each of the nine departments an individual, whom we called a director, and not a board or commission.

In his recent biography, Henry Watterson illuminated this point:

Patriotism cries "God give us men," but the parties say "Give us votes and offices," and Congress proceeds to create a commission. Thus responsibilities are shirked and places are multiplied.

It may happen, however, that the head of a department, upon some important question of policy, would like the advice of able and experienced men. We, therefore, provided advisory committees. The members serve without pay. We have found that many of the ablest men in Illinois are perfectly willing to serve upon an advisory committee without pay, although they could not be induced to take a salaried position. In this way we availed ourselves of the best talent within the state upon the various subjects of state administration.

The Illinois civil administrative code provides for the various subordinate officers within the several departments. It does not, however, attempt to define their precise duties. These duties are prescribed in rules and regulations formulated by the head of the department, and not by statute law. Much debate arose over this proposition. It was objected that this conferred too much power upon the individual head of a department. Many thought that the code should define precisely the duties of the heads of divisions in the several departments.

In my judgment, to have adopted that theory would have greatly impaired the efficiency of the code. "Red tape" would have inevitably crept in. Much of the delay, the inconvenience, even the inaction which

results from what we call "red tape" is not so much the fault of the official as it is of the law. This is true alike of laws of the state legislatures and Congress. Where Congress, in launching government into some new activity, has created a bureau or division, the law makers have customarily gone into infinite detail—they have prescribed with exactitude the duties of each official; they have so limited and delimited the powers to be exercised that the bureau or division is in no sense under the control or direction of the head of the department to which it belongs. The result is inevitable. Instead of actually molding and directing a single department in all its parts, he becomes the presiding officer over a large number of bureaus, each of which is practically independent of all the others.

It is said that there are ten departments of government at Washington. That is so only in name. In fact, there are many times ten independent and practically unrelated agencies of government there. No department under these circumstances can avoid becoming rigid and lawbound, and "red tape" necessarily becomes the rule. If, instead, the department head were authorized to prescribe the duties of subordinates, the "red tape" would largely disappear. The responsible head would have power commensurate with his responsibility. Instead of an inert mass you would have a living organism with an actual head.

Democracy has been afraid of itself and of its own chosen officials, and has hedged them about with so many restrictions that genuine efficiency has been well-nigh impossible. We have framed our laws as though they were to execute themselves, providing in detail for every contingency, leaving no means by which the head could meet unforeseen contingencies. We have gone on the theory that we could tie men's hands for evil, but at the same time leave them free for good. . . .

The chief officials under the Illinois code, such as directors of departments, have their offices in the Capitol at Springfield. The directors of departments and the adjutant general, who is the head of the military department of the state, constitute the governor's cabinet. The governor thus is in daily touch with every activity of the state government. If a weakness develops in the remotest part of the state, he has the means at hand to correct it promptly through the head of the proper department. The head of the department, in turn, through his chiefs of division, over whom he has complete control, can at once reach the weak spot.

An outstanding achievement of the code was that of locating and correcting extravagance and incompetency. This was done through the department of finance, one of the nine departments, as we have seen. This department was made the keystone of the structure. It exercised



two sets of powers: (1) it was charged with the general supervision of the finances of the state; and (2) it was required to prepare a budget.

The department of finance was a new conception in our state government—and in the government of any American state I think. Its function was to see that the government lived within its income, that unnecessary expenditures were checked, that unwise expenditures were prevented and the policies of departments were controlled and co-ordinated. While other departments were imbued with the ambition to extend departmental activities, the department of finance occupied the position of sympathetic critic, proportioning expenditures so as to carry out all administrative policies. By this means a well-balanced administration, serving the needs of the whole state, was secured. Without it, expenditures were incapable of apportionment in accordance with the needs of the various branches of government.

Financial control occupied a large part in the activities of the department. The law charged it with the duty of prescribing a uniform system of bookkeeping, with the duty of examining and approving, or disapproving, of all bills, vouchers and claims against the other departments. This power compelled other departments, not as a matter of law, but as a matter of administrative expediency, to consult the department of finance before any unusual expenditure was made and to procure its advice. In order still further to promote co-ordination of expenditures, as well as co-operation among the departments, meetings of directors were held and financial as well as other policies were discussed. The result of this procedure cannot be stated in dollars and cents. It did not appear upon any particular balance sheet. It was reflected in the general result, not only in unity and efficiency of administration, but in the tax levy, which, in times of mounting prices, had been reduced.

As has been seen, the department of finance was also required to prepare a budget of estimated expenditures and receipts, to be submitted to each regular session of the general assembly. In the exercise of his general supervision over expenditures, the director of finance in effect began the preparation of the budget a biennium in advance. That is, on the first of July, 1917, in approving or disapproving vouchers and investigating into the financial conditions, he was gathering information all the while to enable him intelligently to judge what the appropriations should be for the next biennium. When the next legislature met in January, 1919, the director of finance had a budget ready. He had the information he had acquired as to the needs of the various activities of the state in the exercise of his power of general supervision over the

finances, and in addition he had been able to investigate, himself, when a request was made by any official charged with the expenditure of money, as to the exact needs of the case. The budget thus submitted went before the appropriation committees of the house and senate, and with very few changes was enacted into law.

### b. Cabinet System in New York

[Joseph McGoldrick, in *National Municipal Review*, vol. XVI, pp. 226-228 (Apr., 1927).]

The Short Ballot Amendment approved by the voters of New York state in 1925, reducing the number of elective state officials to four and requiring the consolidation of all government activities into not more than nineteen departments, is now in force and effect. The first elections under the new amendment were held last fall. Governor Smith, a Democratic lieutenant governor and a Democratic comptroller were elected together with one Republican, Attorney General Ottinger. The legislation emanating from the Hughes Reorganization Commission also took effect January, 1927. Under these acts, the great welter of boards, bureaus, and offices that had constituted the government of the state were brought within eighteen departments.

As a corollary to the establishment of this new organization of the state's government, the governor has created, on his own initiative, a cabinet. The cabinet has no more status in law than the President's cabinet. As Governor Smith points out: "It is the right thing. Periodical conferences of department heads are a matter of routine in every big business establishment. They could not get along without such gatherings. The state, with its highly organized business, can even less afford to dispense with councils of that character." The institution is, therefore, likely to be continued by subsequent governors.

The cabinet is likely to achieve two purposes: It will aid the governor in determining the policies of his administration—his legislative program, his dealings with water power, the spending of the \$100,000,000 bond issue authorized in 1925, and the other questions which press for solution. The cabinet is likely also to be an important aid to coördinated administration, the thing which Governor Smith emphasizes particularly. To quote him again: "The primary purpose of these meetings will be to bring about coördination and coöperation in the activities of the state, and to make the head of one department acquainted with what another department is doing. We want to benefit in common from the accumulated experience of all. Where the work of one de-

partment is as closely related to that of another, as we find in the administration of the state, it is of the highest importance that the department heads should be brought together to discuss problems of mutual concern which they must meet in common."

The governor's cabinet consists of fourteen officers, those invited to the first meeting being:

George B. Graves, assistant to the governor and head of the executive department.

M. F. Loughman, head of the department of taxation and finance.

Robert Moses, secretary of state.

Colonel Frederick Stuart Greene, state superintendent of public works.

Sullivan Jones, state architect.

Alexander MacDonald, head of the department of conservation.

Berne A. Pyrke, commissioner of agriculture and markets.

Dr. James A. Hamilton, industrial commissioner.

Dr. Frank P. Graves, commissioner of education.

Dr. Matthias Nicoll, commissioner of health.

Dr. Frederick W. Parsons, commissioner of mental hygiene.

Charles S. Johnson, director of state charities.

Dr. Raymond F. C. Kieb, commissioner of correction.

Mrs. C. B. Smith, head of the state civil service commission.

This includes the heads of all the state's departments except five. Two of these—the department of audit and control, and the department of law—are under elective officials, the comptroller and the attorney-general respectively. In not inviting these, the governor suggested that their offices were routine merely. The attorney general is, however, a Republican, and by reason of his election during the Smith landslide, one of the most conspicuous members of his party in the state. It is more than likely that were the incumbent a member of his own party, the governor would have included him in the cabinet. As it is, the governor has—as he has always had—his own legal adviser. The heads of the department of insurance, the department of banking, and the department of public service are also absent from the cabinet list. The first two are clearly routine, while the latter is presided over by the state public service commission, a quasi-judicial body.

The appointments of the men who have come to constitute the governor's cabinet occasioned considerable notice when they were offered to the senate at the first of the year. The governor was accused of political ambition when he included six Republicans in his list. The truth of the matter is that though all of the six are of Republican antecedents, no one of them has been actively identified with that party in recent years. In fact, all of them have been Smith Republicans during most

of the Smith régime at Albany. A noteworthy thing about the appointments, aside from their high standards of excellency, is the fact that, apart from Mr. Moses, all of the others were already in office. Mr. Moses, as secretary of the New York State Association, has long been one of the governor's closest counsellors and with one or two others had constituted a "Kitchen Cabinet."

While the cabinet has attracted particular attention, it is noteworthy also that the governor is developing a coördinating staff. The Hughes Commission declined to recommend a department of interdepartmental relations, but the governor is developing his own staff in such persons as Mr. Graves, the assistant to the governor and head of the executive department; Mr. Moses, the secretary of state; Mr. Sullivan Jones, the state architect, the only person not a department head who has been made a member of the cabinet, and Mr. Wilson, the director of the budget. Mr. Wilson, though not having a vote in the cabinet, will attend its meetings. It was interesting to note that Mr. Moses, who as secretary of the state will have relatively little to engage him, was placed upon the three most important of the five committees appointed at the first cabinet meeting.

The first meeting was held on Wednesday, February 9. It is planned to have these cabinet meetings follow every two weeks. The proceedings are completely secret aside from what the governor discloses to newspaper men after adjournment. Apart from the members and those specifically invited to attend, the only persons present are the governor's assistant secretary, who acts as secretary to the cabinet, and a stenographer. The agenda or calendar of the first meeting as made public was as follows:

1. Purpose of meetings. Procedure—to be explained by the governor.
2. Reorganization problems to be outlined and discussed.
3. Schedule of all public improvement projects financed from bond issue and other sources to be discussed and ordered prepared. Procedure for keeping it up to date. To be checked and discussed at each meeting.
4. Problem as to New York city office buildings. Appointment of committee.
5. Institutional problems involved in reorganization. Appointment of committees to coördinate work where several departments are involved.
6. Discussion of certain county and regional problems involving close relation between state and local agencies, county government roads and parkways, sewers and country health, etc. Committee to be appointed.
7. Discussion of exchange of personnel incident to reorganization.

The government of the state of New York is certainly one of the largest business undertakings in the country. The state has the third largest public budget in the United States, amounting to more than \$200,000,000, being exceeded in size only by the budgets of New York city and the national government.

Such tremendous enterprises could not long continue to ignore the problems of administration and the lessons of business practice. Governor Smith has been accused of aiming to make a record with 1928 in mind. It would be hard to find a better way of bringing himself before the American people. It is unfair to attribute too much of the publicity which has attended his efforts to his own ambition. Circumstances have made him a national figure and the eyes of the whole country are upon him. Above all it is noteworthy that the governor's interest in matters of administration is not a new thing but has been a characteristic of his entire occupancy of the gubernatorial office.

### 134. PRINCIPLES UNDERLYING ADMINISTRATIVE REORGANIZATION

Administrative reorganization in New York State was recommended by Governor Charles E. Hughes as early as 1910, and a provision looking in this direction was inserted in the defeated constitution of 1915. In 1918 Governor Alfred E. Smith appointed a Reconstruction Commission which in the following year made a report, and incorporated an excellent summary of the existing irresponsible organization and of the principles underlying administrative reorganization. The reorganizations effected in a number of states have in general been based on these principles, and have had the warm approval of most students of government, but there has also been some criticism of them as unsound.

#### a. Report of New York Reconstruction Commission

*[Report of Reconstruction Commission to Governor Alfred E. Smith on Retrenchment and Reorganization in the New York State Government, October 10, 1919, pp. 3-5, 7-8, 11-12.]*

In searching for valid principles on which to base retrenchment and economy in administration we have naturally turned to the experience of other states. Common sense dictates that New York should first of all study carefully the steps which have already been taken elsewhere, with a view to introducing improved methods into the conduct of public business. In making this inquiry the Commission has found that in nearly every State public attention has been forcibly drawn to the necessity of reducing expenditures or at least holding them to the lowest point consistent with the proper discharge of public functions and fair conditions of employment. The Commission has also found that the movement for

economy and efficiency has passed beyond the stage of protest and discussion. Between 1911 and 1917 (when the movement was temporarily checked by the war), a number of States instituted commissions of inquiry for the purpose of discovering more business-like methods in state administration. Examination of the laws creating these commissions brings out the fact that waste and duplication, inevitably accompanying the maintenance of conflicting and competing offices and boards, were the main cause which led these states to seek relief. The reports filed by the several commissions are in substantial agreement on the following points:

1. State administration is a collection of offices, boards and other agencies which have been created from time to time by legislative act without consideration being given to the desirability of grouping all related work in one department.

2. The board or commission type of organization for purely administrative work is generally inefficient owing to the division of powers and absence of initiative and responsibility. This applies with less force to departments in which there are important quasi-judicial or quasi-legislative functions combined with administrative functions. Boards have been successful in many cases in carrying out advisory and inspectional functions and in the general supervision of education. Ex-officio boards are almost never effective.

3. Widely scattered and independent agencies of state government cannot be effectively supervised and controlled either by the Legislature or the Governor.

4. When such a large number of agencies is independent of the Governor, he cannot be held responsible to the voters for an efficient and economical management of public business.

In their recommendations for improvement of administration, the commissions are substantially agreed that economy and responsible government can only result from:

1. The consolidation of offices, boards and commissions into a few great departments of government, each of which is responsible for the conduct of a particular major function such as finance, health, welfare, or public works.

2. Vesting the power of appointment and removal of department heads in the Governor; making him in fact, as well as in theory, the responsible Chief Executive of the state. There is a difference of opinion as to the desirability of confirmation of the Governor's nominations by the Senate.

3. A consolidated budget system with accounting control over spending officers.



The budget recommendations have passed beyond the theoretical stage, for thirty-eight states have enacted legislation providing for a consolidated budget system with varying provisions as to methods of preparation, legislative review, and enactment into law. Half of these States have placed the responsibility for initiating the budget squarely upon the Governor.

The recommendations with reference to the reorganization of boards, offices and commissions have not been accepted by the state Legislatures as readily as proposals for budget reform. The reasons are obvious. A consolidation of a hundred or more offices, boards and other agencies affects political patronage more vitally than does a budget system, and it requires considerable courage and intelligence on the part of a Legislature to reorganize an entire system of state government. Nevertheless, recommendations of commissions are passing steadily into law. . . .

. . . It is sufficient in passing to note that there are five departments and numerous independent boards having authority over the custody of the state parks, reserves and places of interest; that there are more than seven departments assessing and collecting taxes, one of which audits its own collections; more than ten departments of an engineering character; numerous, separate and distinct control and visiting departments, boards and commissions for the correctional, insane and charitable institutions; that the legal functions are scattered through ten departments, beside that of the Attorney-General, and that there are numerous administrations of educational institutions. It is quite apparent that a consolidation of many departments or bureaus should be brought about. . . .

The existing system of administration stands condemned by its obviously objectionable features. It is a vast business enterprise divided into more than one hundred and eighty different parts each running along its own lines, without a responsible head. The Constitution says that the executive power shall be vested in the Governor, but at the same time the Constitution and the laws strip him of the instruments for exercising that power. The officers, commissioners and agents who do the business of the state are not responsible to one authority; they are appointed and removed by many different methods. Their terms overlap and their tenures vary. No Governor can be held responsible for the policies and conduct of high officers whom he does not appoint and whom he can not remove. It is clear that if New York wants retrenchment and efficient government it must make some one responsible who can be held to account and give him power commensurate with his obligations. There is no other way.

. . . . .

The experience of other States in the Union, the experience of the national government with a consolidated administration and a cabinet system and the recommendations of competent authorities lead us to the conclusion that retrenchment and responsibility in the government of the State of New York can be achieved only through:

1. A consolidation of all administrative departments, commissions, offices, boards and other agencies into a small number of departments, each headed by a single officer, except departments where quasi-legislative and quasi-judicial or inspectional and advisory functions require a board.

2. The adoption of the principle that the Governor is to be held responsible for good administration and is to have the power to choose the heads of departments who are to constitute his Cabinet and who are to be held strictly accountable to him through his power to appoint and remove and through his leadership in budget preparation. This involves among other things the reduction in the number of elective administrative officers to two: the Governor and a Comptroller to act as independent financial auditor. Although there are objections to the confirmation by the Senate of nominations by the Governor, we are of the opinion that this check has on the whole worked well and should be retained.

3. The extension of the term of the Governor to four years and the careful adjustment of the terms of department heads with reference to the term of the Governor. Excepting members of boards with overlapping terms, department heads should have the same term as the Governor.

4. The grouping of related offices and work in each of the several departments into appropriate divisions and bureaus, responsibility for each branch of work to be centralized in an accountable chief.

5. A budget system vesting in the Governor the full responsibility for presenting to the Legislature each year a consolidated budget containing all expenditures which in his opinion should be undertaken by the State, and a proposed plan for obtaining the necessary revenues—such a budget to represent the work of the Governor and his Cabinet. Incorporation of all appropriations based upon the budget in a single general appropriation bill. Restriction of the power of the Legislature to increase items in the budget. Provision that special appropriation bills shall secure the specific means for defraying appropriations carried therein.

The only serious argument advanced against such a proposed reorganization and budget system is that it makes the Governor a czar. The President of the United States has administrative powers far greater than those here proposed to be given to the Governor. The Mayor of

the City of New York appoints and removes all of the important department heads, and citizens know whom to hold accountable. The Governor does not hold office by hereditary right. He is elected for a fixed term by universal suffrage. He is controlled in all minor appointments by the civil service law. He cannot spend a dollar of the public money which is not authorized by the Legislature of the State. He is subject to removal by impeachment. If he were given the powers here proposed he would stand out in the limelight of public opinion and scrutiny. Economy in administration, if accomplished, would redound to his credit. Waste and extravagance could be laid at his door. Those who cannot endure the medicine because it seems too strong must be content with waste, inefficiency and bungling—and steadily rising cost of government. The system here proposed is more democratic, not more “royal” than that now in existence. Democracy does not merely mean periodical elections. It means a government held accountable to the people between elections. In order that the people may hold their government to account they must have a government that they can understand. No citizen can hope to understand the present collection of departments, offices, boards and commissions, or the present methods of appropriating money. A Governor with a Cabinet of reasonable size, responsible for proposing a program in the annual budget and for administering the program as modified by the Legislature may be brought daily under public scrutiny, held accountable to the Legislature and public opinion, and be turned out of office if he fails to measure up to public requirements. If this is not democracy then it is difficult to imagine what it is.

### **b. Dogmas of Administrative Reform**

[F. W. Coker, in *American Political Science Review*, vol. XVI, pp. 408-411 (Aug., 1922).]

. . . . .

The principles upon which this [Ohio] and other recent reorganizations are based are clear and familiar. There is, first, the principle of economy: save money and effort by eliminating duplication and overlapping of activity; save both in overhead expense and in clerical, inspectional, and other subordinate work, by bringing together into one large department agencies performing closely similar and closely interrelated functions. No serious exception can be taken to this principle. The only suggestion to be ventured here is this: it is possible that improvement in our state administration, by way of eliminating needless dupli-

cation and overlapping, can be achieved better by a piecemeal process—dealing particularly with each case of duplication—than by the more sweeping method of reconstruction followed by the recent reorganization acts.

Secondly, there is the more fundamental principle of concentration of power and authority: concentrate power in order to attract abler men to executive and administrative offices, in order to give freer rein to able men in office, and in order to secure an easier location of responsibility. The reorganization acts attempt to obtain this concentration in two ways. First, place each main administrative department under a single director, so that there shall be no division of power and responsibility in the control of any such department. Second, give the governor complete control over each director by providing that each director shall serve at the pleasure of the governor, in order that public responsibility for the entire directing personnel of the administration may be inescapably fixed upon one conspicuous official, and also in order to make possible a unified executive policy or program and to facilitate coöperation among the different departments.

However appealing this theory of a unified, responsible executive may be, however valid the theory may be in certain of its applications, it may be subject to more substantial and radical qualifications than our leaders in administrative reconstruction are allowing. The points of challenge can be stated in only a brief, summary way, with the hope that they will receive more authoritative consideration than can be given them here.

First, in the matter of the single headed administrative department, is it true that for all such departments unity of power and responsibility is of more importance than continuity of policy and the maintenance of relations of mutual respect and confidence between head and staff? In the recent Ohio reorganization, have we not in too many instances sacrificed good of the latter sort in the effort to gain advantages of the former sort?

Secondly, are we not in danger of carrying too far the idea that popular control is advanced chiefly by placing vast powers in one elected officer, with the expectation that this officer will feel responsibility so certainly fixed upon him that he will be more sensitive to public opinion than he would be if he possessed a narrower allotment of power? Are we not overlooking other equally potent incentives to good service—other incentives which may be weakened by this centralization of power? Are we not greatly exaggerating the ability of public opinion—even an intelligent and alert public opinion—to keep constant observance upon its representatives and to pass satisfactory judgment upon them periodically? In the last question there is reference to what may be a fundamental

error of the advocates of the principles which we are examining—namely the assumption that popular control over executive officers is applied chiefly through the election and rejection of these officers at the polls. Popular control of the administration of law is not exercised principally through the popular selection and dismissal of executive officers, one or many. It is equally exercised in enacting directly or indirectly a law determining a method of administration. It is an exercise of popular control to determine that we, the people, want our health or charitable services expertly rather than politically administered, and to determine that such administration in accordance with our desires is more likely to be obtained under a director selected by a continuing council than under a director subject to change every two or four years. Our state university and our local schools are administered as nearly in accordance with public opinion as is or will be our department of commerce. Is there any more reason for making a director of health or of public welfare, or of education, subject to change with every change of governor, in the interest of popular government, than to make the president of the state university changeable with each change of governor, or the local superintendent of public schools changeable at each mayoralty election? We, the voters, don't want to be consulted on such questions every two or four years. We believe that in the long run the schools will be administered more nearly in accordance with our needs and desires by not calling upon us to pass periodic judgment upon the matter. It may be doubted if either popular government or efficient government is likely to be advanced by placing the health or public welfare director completely under the control of the governor, or by subjecting the public utilities commission and the industrial commission to interference by directors under the control of the governor, or by transferring the peculiar services rendered by the old board of state charities to a director so controlled.

I am a strong believer in the short ballot principle insofar as it means the short ballot—that is the election of relatively few executive officials, popular election not being, in my opinion, a satisfactory method for choosing more than a very limited number of executive officials. I am ready to part company with the short ballot advocates if they contend that, in order to be consistent, we must place the entire control of our administration in the hands of one or a few officials changeable every two or four years. With the exception of the national government of the United States, a few cities of the United States (Pittsburgh, Boston, Cleveland, for example), and some Latin-American governments, no important government—national, district, or local—anywhere in the world

is organized on the principles upon which many of our reformers of state and city government are defending their plans for consolidated executives.

These recent systems of reorganization give too little weight to such needs as the following: (1) The need of securing continuity of policy in administrative departments having work of a technical and regulation-establishing character; (2) the need for facilitating the establishment of customs and traditions of non-interference by periodically changing political officers; (3) the need for eliciting the participation of disinterested citizens serving on unpaid boards, exercising powers of investigation, advice and publicity; (4) the need for placing legal authority and responsibility in the particular offices most likely to develop a sense of professional responsibility and pride in connection with the work of such offices; (5) the uselessness of extending the scope of power of any officer beyond the limits of what that officer can actually devote his attention to. Both reason and experience show that, for the administration of many functions, diffusion, rather than concentration, of authority, secures not only more efficient but also more democratic administration.

### 135. ADMINISTRATIVE REORGANIZATION BY CONSTITUTIONAL AMENDMENT

The usual method of state administrative reorganization has been through legislative enactment, without constitutional change. This has been due largely to the difficulty of altering the state constitutions. This method, however, in most states would be inadequate, because without constitutional change the reorganization is likely to be incomplete. Consequently, we find that Massachusetts and New York deemed it desirable to adopt constitutional amendments as the basis of reorganization. The Massachusetts amendment is brief while that of New York is more detailed, but in both cases they have to be supplemented by legislation.

#### a. The Massachusetts Amendment

[Art. LXVI of Amendments to Constitution of Massachusetts, adopted November 5, 1918. *Manual for the General Court, 1925-26*, pp. 117-118.]

On or before January first, nineteen hundred twenty-one, the executive and administrative work of the commonwealth shall be organized in not more than twenty departments, in one of which every executive and administrative office, board and commission, except those officers serving directly under the governor or the council, shall be placed. Such departments shall be under such supervision and regulation as the general court may from time to time prescribe by law.



### b. The New York Amendment

[Art. V of Constitution of New York as amended November 3, 1925.  
*New York Legislative Manual, 1927, pp. 118-121.*]

*Comptroller and Attorney-General.*—Section 1. The Comptroller and Attorney-General shall be chosen at a general election, at the time and places of electing the Governor and Lieutenant Governor, and shall hold office for the same term as the Governor and Lieutenant Governor. The Comptroller shall be required: (1) To audit all vouchers before payment and all official accounts; (2) to audit the accrual and collection of all revenues and receipts; and (3) to prescribe such methods of accounting as are necessary for the performance of the foregoing duties. In such respect the Legislature shall define his powers and duties and may also assign to him supervision of the accounts of any political subdivision of the State, but shall assign to him no administrative duties, excepting such as may be incidental to the performance of these functions, any other provision of this Constitution to the contrary notwithstanding. Each of the officers in this article named shall, at stated times during his continuance in office, receive for his services a compensation which shall not be increased or diminished during the term for which he shall have been elected; nor shall he receive to his use any fees or perquisites of office or other compensation.

*Departments and State Government.*<sup>1</sup>—§ 2. There shall be the following civil departments in the State Government: First, Executive; second, Audit and Control; third, Taxation and Finance; fourth, Law; fifth, State; sixth, Public Works; seventh, Architecture; eighth, Conservation; ninth, Agriculture and Markets; tenth, Labor; eleventh, Education; twelfth, Health; thirteenth, Mental Hygiene; fourteenth, Charities; fifteenth, Correction; sixteenth, Public Service; seventeenth, Banking; eighteenth, Insurance; nineteenth, Civil Service; twentieth, Military and Naval Affairs.

*Assignment of functions.*—§ 3. At the session immediately following the adoption of this article the Legislature shall provide by law for the appropriate assignment, to take effect not earlier than the first day of July, one thousand nine hundred and twenty-six, of all the civil, administrative and executive functions of the State Government, to the several departments in this article provided. Subject to the limitations contained in this Constitution, the Legislature may from time to time assign by law new powers and functions to departments, officers, boards

<sup>1</sup> The number of departments was reduced to eighteen by chapter 343, Laws of 1926, effective January 1, 1927.

or commissions continued or created under this Constitution, and increase, modify or diminish their powers and functions. No specific grant of power herein to a department shall prevent the Legislature from conferring additional powers upon such department. No new departments shall be created hereafter, but this shall not prevent the Legislature from creating temporary commissions for special purposes and nothing contained in this article shall prevent the Legislature from reducing the number of departments as provided for in this article, by consolidation or otherwise. The elective State Officers in office at the time this article as amended takes effect shall continue in office until the end of the terms for which they were elected. Pending the assignment of the civil, administrative and executive functions by the Legislature pursuant to the directions of this section, the powers and duties of the several departments, boards, commissions and officers now existing are continued. Subject to the power of the Legislature to reduce the number of officers, when the powers and duties of any existing office are assigned to any department, the officers exercising such powers shall continue in office in such department, and their term of office shall not be shortened by such assignment.

*Department heads.*—§ 4. The head of the Department of Audit and Control shall be the Comptroller and of the Department of Law, the Attorney-General. The head of the Department of Education shall be the Regents of the University of the State of New York, who shall appoint and at pleasure remove a Commissioner of Education to be the chief administrative officer of the department. The head of the Department of Agriculture and Markets shall be appointed in a manner to be prescribed by law. Except as otherwise provided in this Constitution, the heads of all other departments and the members of all boards and commissions mentioned in this article, excepting temporary commissions for special purposes, shall be appointed by the Governor by and with the advice and consent of the Senate and may be removed by the Governor, in a manner to be prescribed by law.

*Certain offices abolished.*—§ 5. All offices for the weighing, gauging, measuring, culling or inspecting any merchandise, produce, manufacture or commodity whatever, are hereby abolished; and no such office shall hereafter be created by law; but nothing in this section contained shall abrogate any office created for the purpose of protecting the public health or the interest of the State in its property, revenue, tolls or purchases, or of supplying the people with correct standards of weights and measures, or shall prevent the creation of any office for such purposes hereafter.

*Civil service appointments and promotions.*—§ 6. Appointments and promotions in the civil service of the State, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably discharged soldiers and sailors from the army and navy of the United States in the late civil war, who are citizens and residents of this State, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made. Laws shall be made to provide for the enforcement of this section.

## CHAPTER XXIV

### THE STATE JUDICIARY

#### 136. THE POSITION OF THE JUDGE

Two outstanding circumstances which determine the position of the American state judge are the method of this selection by popular vote and the comparatively narrow scope of his powers while in office. These circumstances leave him in a far from satisfactory position, which is feelingly described in the following selection, written by one who was himself formerly chief justice of the supreme court of North Dakota.

[Bruce, *The American Judge* (The Macmillan Company), pp. 1-3, 124-127, 193-194.]

No public official is more influential than the American judge; yet no official is more politically helpless. Paradoxical though it may seem, there is no one who is closer to, and at the same time further removed from, the mass of the American people. His duties are so arduous that he must of necessity be a student and a recluse. For fear that he may be charged with favoritism he must avoid even an appearance of undue intimacy with attorneys and with litigants. Even his right of friendship is limited; yet, and especially where the system of primary elections prevails, his position is preeminently political, and he is ever at the mercy of the politicians and of the powers behind the throne, whether those powers be popular, corporate, or democratic in the broader and higher sense of the term. In order to survive the ordeal of the primary elections, at which anyone can be a candidate, and at which every new aspirant may "gumshoe" for election, he should himself be popular and have a large public acquaintance; yet, without losing his self-respect and without degrading his office, it is almost impossible for him to become popular. . . .

And especially helpless is the elective judge of an American appellate court. He is the subject of frequent criticism; yet he has no popular forum and no adequate means of defense. He is both of the world and out of the world. He depends for election upon the public support and the popular suffrage; yet his office is so surrounded by tradition and dignity, and so careful must he be not to express an opinion in advance on questions which later may come before him for judicial determination, that but rarely can he appear upon the public platform or defend

himself or his decisions in the popular press. It is true that he has the law reports in which he may print his opinions; but these the general public never read. His position demands the highest wisdom. He should have the fullest opportunity for quiet thought and a complete freedom from petty annoyances; yet he has no opportunity for this thought and no freedom from these annoyances. . . .

The uncertain tenure of office of the American judges has had much to do with the delays and uncertainties in the administration of justice. Making the holder of the scales of justice a political football can hardly be promotive of judicial impartiality and of judicial equanimity.

Our democratic desire to maintain a popular and ever-present control over our courts and to give everyone a chance and an equal opportunity has made our state judiciary altogether too unstable and has resulted too often, not only in the election of incompetent and untrained judges, but in the denial, even to those who are competent, of an opportunity to familiarize themselves with their duties, to acquire the judicial mind, and to really settle in the harness. A judge needs to be trained as well as a trial lawyer, and the tenure of office is often too short to make this possible. A lawyer fresh from the active practice is rarely at first able to fill the judicial office with satisfaction and to adapt his method of thinking to his new position. In the past he has of necessity been an advocate and a partisan. Now he must be an arbiter and a judge. In the past he has been a specialist. Now he must interest himself in, and familiarize himself with, the whole field of the law. In the past his duty has been to talk. Now it is to listen. Formerly he was interested in the question of the legal possibility and the question whether a certain thing could be legally done. His immediate interests were those of his client. Now they are broader. Formerly he could get along and perhaps could succeed without any broad conception of social needs and of social aims. Now, if he would really serve his state, if he would really do justice to litigants and to the public alike, he must be conversant not merely with technical law but with history and economics and sociology. Often he has come to the bench totally unprepared for its duties and must begin, as it were, his professional training anew. What, for instance, does the personal injury specialist know of the rules of commercial law, or the criminal lawyer of the law of real estate? Yet the judge must know all things. At his bar must be tried all classes of cases; in this age of specialization he alone is denied the right to specialize.

A government by law must find its foundation in a respect for its administrators. There never can be any large measure of respect for the American judge and for a government of law as long as the judicial



primaries exist, and, in them, any lawyer, no matter how incompetent he may be, is able and willing to throw his hat into the ring. There can be no respect for the law as long as the candidates for the judicial office resort to the methods of the demagogue and of the ward heeler. A primary election system compels the judges who are already in office and who seek reelection to beg for votes, and no judicial officer who does so can be respected. The honorable refuse to do this and sooner or later the honorable usually fail of reelection. Something indeed is wrong when judges such as Cooley of Michigan, Mitchell of Minnesota and McClain of Iowa are driven from the bench.

A sitting judge cannot possibly carry on a successful political campaign against an aggressive and conscienceless antagonist. He is supposed to administer the established law and he cannot promise to carry out the will of the temporary majority. A member of Congress or a candidate for the legislature, perhaps, can do these things. He can argue policies on the rostrum and on the stump and can promise to carry them out. He can dissertate at length on the achievements of himself or of his faction or party. He can pledge and he can promise. He can reward his friends. The judge, however, can promise nothing. He can reward no one. Justice should be blind. Even though his decisions are misquoted, the jurist has no means of defense. He cannot even conduct a campaign or ask others to do it for him. How can an honest judge ask men and factions and interests to work for him at election time when he knows that during the next month or year these men or factions or interests will have lawsuits in his court which he must pass upon and decide? A congressman or senator may, with a measure of personal honesty, be loyal to his supporters and to his friends; a judge must have no friends. . . .

In many states we have made our trial judges mere umpires and keepers of the peace, when it must be apparent to all that they will often be able to aid the jury greatly in the determination of their cases, and that the benefits that can be derived from their superior knowledge and training cannot profitably be ignored. This denial can only be due to a distrust of government and of the judiciary which does not exist in England or in any of the British dominions, and which does not speak well of our selective methods. In these latter days the distrust has been augmented by the fact that by subjecting our judges to so many and so frequent elections we have taken from them much of their prestige. We have done all in our power to deprive them of their independence and to make them play at politics. It is difficult for a lawyer to respect a judge who in the past has asked for his support on election day, and it is asking



much of a judge to reprimand or otherwise to curb the zeal of a lawyer on whose good graces his reelection may depend. The quite general efficiency and the almost universal probity of the American judiciary under these adverse circumstances, is something of which the American lawyer may well be proud and is a remarkable illustration of our national integrity; but we are playing with fire, and both in these matters and in the clamor for the judicial primary election and the judicial recall our impatient and distrustful democracy is working against its own best interests.

### 137. THE SELECTION OF JUDGES

As pointed out in the preceding extract, the election of judges by popular vote is subject to many objections. Many suggestions, both practical and theoretical, have been made for improving the method of selection. The following extracts, based upon careful consideration of actual conditions in a typical American metropolitan area, are among the most valuable of recent suggestions in this direction. The first extract is from a report of a committee of the Cleveland Bar Association embodying recommendations for changes in the method of selecting judges in Ohio which, although following in the main a plan previously suggested in other quarters, contains certain novel features.

#### a. Recommendations of the Cleveland Bar Association Committee

[*Journal of the American Judicature Society*, vol. 10, pp. 178-179 (Apr., 1927).]

After studying the problems involved, a majority of the Committee is of the opinion that practically all the judges of the Ohio courts should be appointed and not elected, and that whatever changes in the law may be necessary to bring this about should be made.

This recommendation apparently involves the duty of formulating and recommending the particular method of selecting judges, which, in the judgment of the Committee, is most likely to secure the best appointments for the respective courts.

A majority of the Committee accordingly submits to the Executive Committee the opinion that:

1. The judges of the courts of Ohio should be appointed and not selected by popular vote, except as noted below.

2. A plan for the selection of judges, substantially as follows, should be adopted:

- (a) The election of the chief justice of the supreme court by popular vote;

(b) The appointment of associate judges of the supreme court by the governor, with the approval of two-thirds of the members of the Senate, or the approval of a judicial council selected by the Senate;

(c) The appointment of judges of the appellate courts by the chief justice of the supreme court, with the approval of a majority of the associate judges of the supreme court;

(d) The appointment of judges of all other courts by the chief justice of the supreme court, with the approval of a majority of the judges of the appellate courts for the respective districts within which the appointees are to serve;

(e) Every judicial appointment to be for a term of six or eight years.

#### SUGGESTIONS IN SUPPORT OF RECOMMENDATIONS

All of the members of the Committee are well aware of the fact that it would be extremely difficult, if not impossible, to secure at this time the constitutional and statutory amendments necessary for the establishment of the system suggested. It is, however, the duty of the bar associations to take note of the faults and failures of the systems for selecting judges that have been given thorough trials and to press for the adoption of such methods as are believed to be the most reliable. The administration of justice is at best a difficult and delicate matter and any system that is known to be deficient should be readily discarded. Both the partisan system and the non-partisan ballot plan have been tried and found wanting. If there is any other that is better than these, or that gives promise of better results, it should be adopted. The defects and dangers of the non-partisan system, and especially of the right to nominate judicial candidates by petition, have been so fully demonstrated in Ohio in recent years as to make it unnecessary to submit arguments to a body of lawyers on the necessity for a change. We cannot recommend a return to the old convention system, for that means the practical selection of judicial candidates by the managers of the leading political parties. Possibly some other shifts based on the elective system might be tried out, but why continue these experiments? We are entitled to a better and more logical system, and it is high time that we asked for it. The courts should not be kept in politics, either through political parties or through the activities of candidates who nominate themselves for judicial positions. Candidates for legislative and executive positions, rightfully enough, are required to subject themselves to political contests. They are generally supposed to represent certain policies and the voters have a right to know and compare the policies and purposes of the various

candidates. But this is not, or should not be, true of judicial candidates. They should be chosen only on the basis of peculiar fitness for the respective judicial positions. The qualities desired are such that the selection of material is extremely difficult, especially in large centers of population. It is now generally conceded, and is apparent on the face of things, that it is not possible in large cities (and it is extremely difficult anywhere) for the average voter to know the facts that will enable him to select the best judicial material for the various courts.

In this matter it seems that we have pushed our democratic notions a little too far. Ours is about the only large country in the world in which judges are chosen by popular vote. We are very tolerant in the use of objectionable political machinery so long as it calls for the vote of the people. Fortunately at the time of the adoption of the Federal Constitution the appointive system was well known and was embodied in the Constitution, with the result that we have always had a much better federal judiciary than could have been secured by any possible system of popular elections. This undoubtedly accounts for the fact that these courts are not included in the general criticisms to which our courts are constantly being subjected.

There is now a general agitation in favor of the short ballot. This movement is based upon the principle that the best results can be secured by electing a few officials and placing upon them the responsibility for securing the proper administration of the laws through subordinates. We have learned the lesson that it is not possible for the average voter to keep in touch with the details of administration. It is only possible to select heads of departments and hold them responsible for results. In our opinion, this general idea should obtain most of all in administering the judicial branch of the state government. There should be one general head in the judicial department—the chief justice of the supreme court. He should be kept in touch with all of the courts and should have some responsibility for the work of all. He should be responsible to the people and should therefore be elected by them for a reasonable term of years.

Generally speaking, the entire responsibility for the administration of justice should be upon the courts themselves. It can best be placed there if the power of selecting judges is entrusted to that department. This is one reason for the recommendations we are making. But another and stronger reason is that the courts have the best possible opportunities for observing and judging the work of the lawyers and for selecting from the ranks of the lawyers the best judicial timber. It is perhaps best that no court should select its own members. But there seems to be no valid

reason why the chief justice, with the approval of the members of the supreme court, could not make the best possible selection of the appellate judges for the state, and why the chief justice, with the approval of the appellate courts of the respective districts in which vacancies occur, could not make the best possible selections for all courts inferior to the appellate courts. It is only by some such system as this that the maximum of responsibility for results can be placed upon the courts themselves, and it is only through some such system that the most intelligent selection of judges can be made. . . .

#### **b. Recommendations of Cleveland Survey of Criminal Justice**

[*Criminal Justice in Cleveland* (The Cleveland Foundation, 1922), pp. 364-365.]

It is the consensus of opinion of the bar and the unanimous conviction of the ablest students of our legal institutions that strong and well-qualified judges are most certainly secured when they are appointed by the Executive and hold office for life, subject, of course, to removal for misconduct. On the evidence, there is every reason to believe that this method of selection, or a modification of it, plus long tenure, would do more than anything else to revolutionize the present state of affairs. If it be within the field of possibility, this is unquestionably the goal to be striven for. On the other hand, one cannot ignore the fact that in this matter, as in matters affecting standards of admissions to practice, the bar does not seem to possess public confidence and is unable to gain acceptance of its views. On this point there is a gulf of misunderstanding between laymen and lawyers that has not been bridged. The body of the people seem determined to retain the power of selecting their judges, and wherever that is so, the only practical step is to make the elective system operate at its maximum possible efficiency.

Within the limits insisted on by the democratic impulse much can be done. Almost every conceivable method of selecting judges has been tried in the various States and, as Dean James Parker Hall made clear in his address before the Ohio Bar Association in 1915, each method can point to a success in some State. As an extreme illustration, judges are elected in Vermont by the legislature for two-year terms. Theoretically this is as bad a plan as could be devised; but actually in Vermont good judges are chosen and hold office for life. Popular election of judges has done splendidly in Wisconsin, where the tradition has grown up of steadily reelecting the judges.

The secret in obtaining good judges is that back of the method—whatever it is—there must be a tradition which makes the selecting group realize that it is clear public policy to retain judges in office except for grave mental, moral, or physical defects. This tradition has been built up in New York, Wisconsin, Vermont, Connecticut, and elsewhere, but seems not to exist in Cleveland (with the exception, strangely enough, of the Probate Court), and it cannot be secured overnight. Its growth may, however, be aided.

To that end the following principles should be incorporated into the elective system, if that is to be retained in Cleveland. Judges in first instance should be elected as they are now. Their first term should be comparatively short, say, six years. At the end of that time they should run for reelection for a longer term of, say, ten or twelve years, and for this purpose they should run *against their own record*, not against a motley group of other candidates. In other words, the voters decide a plain issue: Shall the judge be retired or shall he be retained? The third term should be even longer and consist of, say, twenty years. In the event of the retirement of a judge a special election, in which he could not be a candidate, would be held.

Such a plan will reduce very greatly the amount of electioneering and the constant interruption of judicial work thereby occasioned. For a judge to run against his own record is infinitely less degrading than the scramble for votes in the open field. The question of reelection or retirement will be an issue of moment and on it all the responsible agencies in the community can focus their attention.

The tendency will clearly be to retain judges in office; the average tenure will be substantially longer. The enormous advantage of the longer tenure is this: There is a splendid tradition of service, the heritage of centuries, which attaches to the judicial office and which elevates every man who takes the oath of that office. This tradition, constantly at work, plus the experience gained as the years go by, takes inferior men, if need be, and develops them into superior judges.

The method suggested in no respect deprives the community of its right to select its own servants and to discharge those with whom it is dissatisfied. For that reason it is a feasible method. And, as it is calculated to make the method of popular election operate at maximum instead of mediocre efficiency, it would give results.



## c. The California Plan

[Charles Aikin, "A New Method of Selecting Judges in California," *American Political Science Review*, vol. 29, pp. 472-473 (June, 1935).]

Many political scientists have condemned direct election of judges. Of late, an increasing number have recommended the plan of having a judge "run against his record" instead of having him run for office on the strength of his record and at the same time campaign against declared opponents. In California, an experiment has recently been undertaken designed to test the validity of such a plan.

By popularly initiated constitutional amendment, originated by the Commonwealth Club of California and supported by the state chamber of commerce, the state has modified its long-used method of selecting judges of the supreme courts and the district courts of appeal.<sup>1</sup> The amendment neither ends all popular election of judges nor vests all authority for selection in the hands of state officers. It provides that an incumbent, shortly before the close of his term, may signify that he desires to retain his judgeship. His name then appears on the ballot, the electorate voting merely on whether or not he shall be retained in office. If the majority vote "No," a vacancy occurs; and in all cases of vacancy, from this cause or any other, the governor—subject to the approval of a newly created commission on qualifications—makes an appointment. The commission on qualifications acts by a majority of its membership, and is composed of "(1) the chief justice of the supreme court, or, if such office be vacant, the acting chief justice; (2) the presiding justice of the district court of appeal of the district in which a justice of a district court of appeal . . . is to serve; . . . or, in case of the nomination or appointment of a justice of the supreme court, the presiding justice who has served longest as such; . . . and (3) the attorney-general." The name of each nominee thus selected to fill a vacancy appears on the ballot at the next general election, the voters again deciding one thing, i.e., whether the person appointed shall serve out the term for which he was appointed. A favorable vote continues the judge in office. If a majority vote "No," a vacancy again occurs.

The amendment provides also that superior (county) court judges may be selected in like manner in the case of any county voting to give up the existing method of election in favor of the new plan. It stipulates, further, that the recall provision of the constitution shall continue to apply to all judges, and it instructs the legislature to establish a system of retirement allowances for judges.

<sup>1</sup> Sixty-five per cent of those who voted at the election voted on this proposal which was adopted by 810,320 to 734,857.



## 138. REFORM OF JUDICIAL PROCEDURE

Many defects in the administration of justice, both civil and criminal, exist, which have led to widespread dissatisfaction and to a movement for judicial reform. Scientific surveys by competent observers have been made of the judicial systems in certain states and cities, resulting in recommendations for improvement. Among the more noteworthy of these studies is the Missouri Crime Survey, the recommendations of which regarding the reform of criminal procedure were written by former Governor Herbert S. Hadley of Missouri, who is recognized as one of the leading authorities in the country upon this subject.

[*The Missouri Crime Survey* (The Macmillan Company), pp. 358-373.]

## FUNDAMENTAL CHANGES IN PROCEDURE

Every person charged with a felony shall, without unnecessary delay after his arrest, be taken before a magistrate, or other judicial officer, and, after being informed as to his rights, shall be given an opportunity publicly to make any statement and may answer any questions regarding the charge. . . .

Prosecution for crime may be either by indictment or information. It will be sufficient in either case to name or otherwise state the offense to be charged. The court, for good cause shown, shall require the filing of a bill of particulars. . . .

The defendant and the state shall be entitled to legal process to secure the attendance of witnesses and each may, if the presence of a witness cannot be secured, take the deposition of such witness whether within or without the state, under such conditions to be fixed by the court as will protect the rights of the defendant. Both the state and the defendant may use the testimony of any competent witness who has testified at any hearing of said charge, providing said testimony was given in the presence of the defendant with an opportunity for him to cross-examine such witness. The court may also under such conditions as will protect the rights of the defendant permit the state or the defendant to take the deposition of a witness within its jurisdiction, upon a showing that said witness is likely to leave said jurisdiction before the trial of said case. . . .

The defendant shall be a competent witness in his own behalf and if he testifies shall be subject to cross-examination as any other witness. If he fails to testify as a witness, his failure to do so may be commented on by the court and counsel in their statements to the jury. . . .

The defendant shall be presumed to be innocent of the offense charged, and the indictment or information shall not be considered as evidence of guilt, but the effect of this presumption shall be only to place upon the

state the burden of proving him guilty beyond reasonable doubt, and court shall so instruct the jury. . . .

In the conduct of the trial, including the examination of witnesses, the judge shall have the same powers as at common law. He shall instruct the jury as to the law applicable to the case and in said instructions may make such comments on the evidence and the testimony and character of any witness as, in his opinion, the interests of justice may require—provided, however, that the failure of the court to instruct on any point of law shall not be ground for setting aside a verdict of the jury unless such instruction is requested by the defendant. Such instructions and comments by the trial court shall be reduced to writing, before delivery, unless a stenographic record is made at the time of delivery. . . .

In all felony cases a five-sixths verdict of a jury shall be sufficient to convict, except in cases where death may be the penalty imposed, and in which cases the verdict of the jury must be unanimous. In misdemeanor cases triable before a jury the jury shall consist of six, and a five-sixths verdict shall be sufficient to convict. The defendant, in any case except where the death penalty may be imposed, may waive a trial by jury and have the case tried by the court. In all jury trials, only the question of guilt shall be decided by the jury, and the trial judge shall fix such punishment as may be authorized by law. Before sentence the judge shall be advised of the defendant's criminal record so far as obtainable, and may seek information as to his mental condition.

A defendant shall have the right to appeal to an appellate court following a verdict and judgment of guilty. The appellate court shall, on appeal, in addition to the issues raised by the defendant, consider and pass upon all rulings of the trial court adverse to the state which it may be requested to pass upon by the prosecuting officer of the county or the Attorney-General of the state. The state may also prosecute an appeal by the prosecuting officer or by the Attorney-General of the state from any adverse rulings or decision of the trial court, except a verdict and judgment of not guilty. On the hearing of an appeal a judgment of conviction shall not be reversed on the ground of misdirection of the jury or rejection of evidence, or for error as to any matter of pleading or procedure, unless in the opinion of the appellate court, after an examination of the record before the court it shall appear that the error complained of has resulted in a miscarriage of justice.

The appellate court may call witnesses or receive affidavits in reference to any controverted question of fact relating to the procedure in the trial, or may call upon the trial court to examine into and correct a statement in reference to such matter of procedure. In all appeals,

typewritten transcripts of the record and typewritten briefs may be used by permission of the appellate court. In case the appellate court considers the punishment fixed is excessive, it may reduce the same without remanding the case for new trial.

In all capital cases, the record must be reviewed by the highest court of appeal. If the defendant be found indigent by the trial court, the expense of the appeal, together with a reasonable attorney fee to be fixed by the court, shall be paid by the county in which the crime was committed. . . .

After an indictment has been returned or an information filed in a court of record, there shall be no nolle prosequi entered except on a written statement of the prosecutor, giving his reasons therefor. If, in the opinion of the trial court, such reasons are not sufficient to justify such action, the judge can refuse to enter said dismissal or he can make further investigation as to whether such case should be prosecuted. If the trial judge decides that such prosecution shall continue, he shall have the authority, if he thinks the interests of justice require it, to appoint a special prosecutor to conduct said case. . . .

A. Whenever a person under indictment desires to offer a plea of insanity he shall present such plea ten days before trial or such time thereafter as the court may direct.

B. If a defendant when brought to trial for a criminal offense appears to the court to be or is claimed by his counsel to be insane, so that he cannot understand the proceedings against him or assist in his defense, the question of his sanity shall first be determined and if he is found to be insane he shall not be tried, but shall be confined in a proper institution. If later he is found to be sane, he shall then be brought before the court on the original charge and the prosecution shall not be prejudiced by such lapse of time.

C. Whenever in the trial of a criminal case the defense of insanity at the time of the commission of the criminal act is raised, the judge of the trial court may call one or more disinterested qualified experts, not exceeding three, to testify at the trial and if the judge does so, he shall notify counsel for both the prosecution and defense of the witnesses so called, giving their names and addresses. On the trial of the case, the witnesses so called by the court may be examined by counsel for the prosecution and defense. Such calling of witnesses by the court shall not preclude the prosecution or defense from calling other expert witnesses at the trial. The witnesses called by the judge shall be allowed such fees as, in the discretion of the judge, may seem just and reasonable, having regard to the services performed by the witnesses. The

fees so allowed shall be paid by the county where the indictment was found. .

D. Whenever in any indictment or information a person is charged with a criminal offense arising out of some act or omission, and it is given in evidence on the trial of such person for the offense that he was insane at the time when the alleged act or omission occurred, then if the jury before whom such person is tried concludes that he did the act or made the omission, but by reason of his insanity was not guilty according to law for the crime charged, then the jury shall return a special verdict that the accused did the act or made the omission but was not guilty of the crime charged by reason of his insanity.

E. When the special verdict provided for in Section D is found, the court shall immediately order an inquisition to determine whether the prisoner is at the time insane, so as to be a menace to the public safety. If it is found that the prisoner is not insane as aforesaid, then he shall be immediately discharged from custody. If he is found to be insane as aforesaid, then the judge shall order that he be committed to the state hospital for the insane to be confined there until he has so far regained his sanity, that he is no longer a menace to the public safety. . . .

### 139. NEWER DEVELOPMENTS IN THE ADMINISTRATION OF JUSTICE

In previous selections, some account has been given of the various defects in the administration of justice which cause delay, expense, and inconvenience to various classes of litigants to such an extent in many cases as to amount to a denial of justice. Members of the bench and bar are naturally conservative and having become accustomed to the system as it exists, however cumbrous, are loath to make a change. Nevertheless, the force of public opinion is gradually compelling the introduction of methods better adapted to the needs of litigants, involving changes partly within the regular judicial organization and partly outside of it. Among these new developments may be mentioned small claims courts, conciliation, arbitration, administrative tribunals, and declaratory judgments.

#### a. Small Claims Courts

[Reginald Heber Smith, *Justice and the Poor* (Carnegie Foundation for the Advancement of Teaching, Bulletin No. XIII, 1919, published by Charles Scribner's Sons), pp. 41-42, 52-56.]

The inability to provide justice in small causes has always been one of the weakest points in our system of administering justice. From the days of ordeal by battle, the method provided by the common law for proving and reducing to judgment any type of small claim has been

cumbersome, slow, and expensive out of all proportion to the matter involved. Our legal system has taken too literally the ancient maxim, "de minimis non curat lex." A complicated procedure requires the attorney, but the expense for his services is more than the traffic can bear. It was once asked at a meeting of the American Bar Association whether a lawyer in suing for seven dollars wages due his client, a blacksmith, was justified in charging a fee of half that amount. The question reveals the common dilemma—the services were worth the amount charged and yet, to the blacksmith, it would hardly be satisfactory to collect seven dollars at a cost of three dollars and a half. As Dean Pound puts it:

"For ordinary causes our contentious system has great merit as a means of getting at the truth. But it is a denial of justice in small causes to drive litigants to employ lawyers and it is a shame to drive them to legal aid societies to get as charity what the state should give as a right."

Similarly, court costs constitute an expense prohibitory to small litigation. The man hired at fifteen dollars a week who is put off the first week and not paid the second has a valid claim for thirty dollars but often not a dollar in his pocket. In addition to any attorney's fee, he cannot pay court costs because he has not been paid, and yet because he has not been paid court action is imperative. It is indeed a vicious circle, but within that circle thousands of unpaid wage-earners have been caught.

Delay plays its part by permitting a debtor, who has no real defence, to file an appearance and answer and interlocutory motions, to have the case continued once or twice, and then, when it is finally called for trial, to default. This serves to hold the plaintiff off for months, to cause him loss of time in court attendance, and to rob the ultimate judgment of much of its worth.

Small tradespeople to-day are forced to the practice either of wiping all small claims off their books or of selling them at a ridiculous discount to professional collection agencies. They have the possible relief of increasing the price of the necessities they sell, thereby adding the waste of the judicial system to the cost of living. The wage-earner and the small lodging-housekeeper, under conditions of modern competition, have not even that relief; they have been obliged to stand their losses.

...  
This deplorable condition is not the result of the evil machinations of any group or class; it is the consequence of the failure of the judicial



system to keep pace with the changing conditions of life. In our judicial history small cases were first entrusted to justices of the peace. This plan for a while gave simplicity and despatch, but when applied to cities it failed utterly. The justices, being subject to no supervision, and depending so much on their fees that J. P. came to mean "Judgment for the Plaintiff," formed unholy alliances with collection agencies, installment houses, and the like, and very generally became actually corrupt. They were so strongly entrenched in local politics that the process of ousting them, which is not yet completed, has been long and difficult. They have aptly been called "those barnacles of jurisprudence" because they have clung on long after their usefulness expired.

In the cities, the justice of the peace was first supplanted by specially created magistrates who, as the cities continued to grow, became just as inefficient and even more corrupt. Finally, they were succeeded by the organized modern municipal court of the type that is now familiar. With the municipal court came honest, trained, and capable judges, but also there came the rules of pleading, of procedure, and of evidence. Honesty and certainty were secured at the sacrifice of simplicity and speed. There has been a steady tendency to increase the jurisdictions of the municipal courts so that they have lost sight of the little cases; expense and delay have been allowed to creep in, with the result that small claims have not been cared for satisfactorily.

In a few communities the last and logical step has been taken of combining the simplicity, speed, and cheapness which were sought in the justice of the peace plan with the honesty and efficiency of the municipal court by a new type of court termed variously "small claims court," "small debtors' court," "conciliation court," and "court for small causes." The name of "small claims court" is the most descriptive and, to avoid confusion, will hereafter be applied to all such courts. . . .

These four types of small claims courts have amply demonstrated that as to small civil causes the defects of the traditional administration of justice can easily be eliminated. In these courts delay is entirely absent. Costs, either through reduction or abolition, cease to forbid access to the courts. The fundamental difficulty of the expense of lawyers is avoided by a simplicity of pleading and procedure in which there is no need for any attorney. The accruing advantage of having the parties brought into direct contact with the judge, of making justice seem a more real thing to the average man with its resultant beneficial effects on good citizenship and loyalty can be only mentioned here. The small claims courts are a mighty force in revising the present day opinion of the humbler classes as to law and courts.



Second, the proceedings must be conducted without lawyers. Only in this way can the simplicity of procedure be maintained and the prohibitive expense of lawyers' services be eliminated. On all the evidence there seems to be no danger in informality of procedure in these small cases. . . .

The third principle is that while procedural law can be cast aside, rules of substantive law must be adhered to. This is the situation at present and in future extensions of the idea it cannot safely be departed from. In other words, while the small claims courts clearly demonstrate that the doing of justice is not dependent on religious observance of our traditional rules of procedure and evidence, they do not at all invalidate or weaken the principle that justice is best done when it is ascertained and administered by a trained judge, according to the rules of substantive law. . . .

The essential features of a small claims court are extremely low costs or none at all, no formal pleadings, no lawyers, and the direct examination of parties and witnesses without formality by a trained judge who knows and applies the substantive law. . . .

## b. Conciliation

[Reginald Heber Smith, in *American Bar Association Journal*, vol. 9, pp. 746-747 (Nov., 1923).]

### 1. THE NATURE OF CONCILIATION

. . . . .

The purpose of conciliation is to secure peace. We are not discussing international conciliation, or conciliation in collective disputes between capital and labor—this needs to be underlined and kept in mind. We are considering conciliation as applied to the ordinary, everyday disputes between men, those individual controversies—contracts, debts, claims for damages, etc.—that today can be settled only by litigation in the courts.

We are resuming a discussion broken off more than sixty years ago. In the dramatic period that centers around the year 1848, new ideas were abroad in the world; many of our states remodeled their constitutions; and six of them, including New York in the east and California in the west, inserted provisions saying: "The legislature may establish tribunals of conciliation." Not a single tribunal was established, the whole idea was submerged in the swift current of affairs culminating in the Civil War. It was forgotten, but today after two generations, the subject again presses for attention by the American Bar.

The nature of conciliation makes a precise definition difficult. Conciliation is not an institution (like a court); it is a *method*. A method of procedure, if you wish, but conciliation proceedings are so informal, so flexible, and so variable that our ancient friend, Mr. Chitty, who wrote an early treatise on pleading and knew exactly when to demur to an anticipatory replication in a declaration, would indignantly say that conciliation had no procedure worthy of the name at all. Although we cannot define the method of conciliation in detail because there are no fixed details, we can state its general form and outline. . . .

Conciliation is an informal proceeding by which two disputants are enabled to discuss the issue between them in private before a trained and impartial third person having the dignity of official position, representing the state, who explains to them the rules of law applicable, informs them of the uncertainty and expense of litigation, tries to arouse their friendly feelings and suppress their fighting instincts. If an adjustment agreeable to the parties is reached, the official draws up a proper agreement, has it signed, and certifies it so that it may be entered in court as a judgment. There are no pleadings. There are no rules of evidence. The parties tell their stories in their own words. There are no lawyers—plaintiff and defendant appear in person.

## 2. RELATION OF CONCILIATION TO THE ADMINISTRATION OF JUSTICE

What is the relation of this conciliation proceeding to the administration of justice; where does it fit into our established legal institutions? Conciliation, being flexible, adapts itself to our present system in different ways, and appears in various guises, but a sound analysis reveals, I think, two distinct types of relationship:

(1) Conciliation may be carried on by tribunals acting entirely independently of the courts. Here conciliation is an auxiliary to the system of courts. The connecting link is the provision of law that no case can be tried in the courts until first an attempt at conciliation has been made.

(2) Conciliation may be employed by the courts themselves. In this case, conciliation becomes a new piece of equipment for securing justice, entrusted to the judges in addition to their duties under our traditional system of litigation.

If we can keep these two types distinctly in mind, it will clarify the later discussion; but it is far more important to note that in both cases conciliation serves and aids the administration of justice. There is much confusion and misunderstanding on this point. There is an idea that the plan of conciliation is hostile to and irreconcilable with our common law

system of securing justice. It is not difficult to see what causes this mistaken conclusion.

Conciliation is the way of peace, while litigation, which grows out of the ordeal by battle, still represents the idea of conflict. The salient features of conciliation are the antithesis of the characteristic features of the common law trial system: privacy as against public hearings, no procedure as against an elaborate procedure, no rules of evidence as against multitudinous rules of evidence, no jury as against the guarantee of a jury of one's peers, the absence of attorneys as against the necessity for the presence of attorneys.

If we had to choose between the two, of course, we should select the common law system which alone has the power needed for certain types of cases and persons. But because the two types are opposite it does not follow that they are alternatives, one excluding the other. In truth, they are complementary, each aiding the other.

The conciliation proceeding is used before *and only before* resort is had to litigation in the courts. Insofar as it fails, the regular work of the courts in conducting litigation remains unchanged and unimpaired. Insofar as conciliation succeeds, litigation is avoided and the burden of the courts is lessened.

We can fix the place of conciliation in the general scheme of things, and incidentally throw further light on the nature of a conciliation proceeding, by contrasting it with a small claims court and an arbitration proceeding.

A small claims court uses very informal procedure, but it is a court of law. Its decision is based on the rules of substantive law. The defendant appears in answer to a compulsory summons. It has legal jurisdiction. Its judgment is as binding as that of any court in the land.

An arbitration proceeding is not a court proceeding. The arbitrator has jurisdiction only when the parties *voluntarily* sign a submission to arbitration. From that point on arbitration is compulsory in the sense that the award can be filed in court and is binding on both parties whether they like it or not.

A conciliation proceeding in its pure form is a voluntary proceeding from first to last. The tribunal has no compulsory jurisdiction over the defendant. The plaintiff cannot sue in the law courts without first coming before the conciliation tribunal, but it has no other power over him. It may or may not follow the substantive law. The conciliator may suggest any honorable adjustment or solution. He cannot render a decision or enter a judgment unless both parties agree to it.

The entirely voluntary character of conciliation is at once the source of its moral power and the limitation on its legal power. What if the defendant refuses to appear? Then conciliation fails. Or, if the plaintiff comes with this attitude: "I am here because I have to go through this form but my heart and mind are closed; I'll have the law on this defendant yet?" Then again conciliation fails. Finally, if the conciliator after hearing the facts is convinced that the defendant has cheated the plaintiff, but finds that the defendant is obdurate, what can he do? Nothing. He cannot make a finding. He cannot advise the court. His lips are sealed, the conciliation tribunal is like a confessional.

After this catechism one may think that conciliation is an Utopian dream. As practical men, concerned with the actual improvement of the administration of justice, we are not interested in a metaphysical discussion as to the inherent uprightness of human beings. As proof that conciliation can succeed we want evidence that it has succeeded.

### 3. THE PRESENT EXTENT OF CONCILIATION

Let us take a bird's-eye view and see how far conciliation has already been utilized.

Conciliation tribunals have existed in Norway and Denmark for more than a century. A law providing conciliation tribunals was enacted in North Dakota in 1921, and in Iowa in 1923. These are instances of pure conciliation, administered not by the courts, but by independent tribunals or officers, so that conciliation is an auxiliary to the regular court system.

Conciliation administered by courts is to be found in the small claims courts in Cleveland, Milwaukee, and Minneapolis. The procedure of a small claims court is so informal that it is easily converted into conciliation procedure. The two merge and become indistinguishable. The small claims court in Cleveland, for example, has always been called the "Conciliation Court."

Conciliation is employed by industrial accident commissions. Where cases are not automatically settled and formal hearings appear necessary, several commissions first try an intermediate informal hearing. This plan has been successful; many cases are successfully disposed of. These are not labelled "Conciliation hearings," but that is nevertheless what they are.

Domestic relations courts are more and more invoking this method. Conciliation becomes reconciliation. When it succeeds it is far more efficacious than any other remedy known to the law.

In 1917 the Justices of the New York Municipal Court, acting under power vested in them by law, issued a series of rules providing for conciliation.

In America, conciliation has been employed only in connection with limited types of cases. We have noted domestic relations and industrial accidents. In North Dakota it applies only to claims of \$200 or less; in Iowa to claims under \$100; in Cleveland to matters involving \$35 or less. The Minneapolis Conciliation Court has jurisdiction up to \$100. In cases under \$50 it has power to enter judgment; as to cases over \$50 it has no compulsory power and this pure conciliation proceeding is little used.

In the Scandinavian countries, on the other hand, conciliation plays its part in practically all types of civil cases.

While experiments with conciliation are naturally made on the little cases first, there is no logical reason why conciliation should be limited by jurisdiction or by amount of money involved. Conciliation is a *method*, and as such is applicable to other types of cases as well.

#### 4. WHAT BENEFITS MAY BE DERIVED FROM CONCILIATION

When the New York Municipal Court Justices issued their rules they said: "The conciliation system marks a new epoch in the administration of justice in this state."

Insofar as conciliation proves successful certain direct and substantial benefits will flow from it. Because of its very nature a conciliation proceeding is inexpensive and is not subject to delays. Cheapness and speed are a blessing to all litigants, and a Godsend to the poor.

Conciliation prevents litigation by rendering it unnecessary, and this means less congested dockets, less pressure on overdriven judges, and ultimately a lightening of the taxpayer's burden.

Modern conditions of life engender a great deal of friction that in turn produces a mass of litigation. Disputes run all too easily into class, religious, and racial animosities and prejudices. Litigation tends to inflame and perpetuate quarrels. When the state provides conciliation tribunals it teaches the lesson of moderation, forbearance, mutual adjustment and honorable compromise. When conciliation becomes firmly established in the traditions of a people, it exerts a powerful influence for their greater happiness, prosperity, and safety.



## c. Arbitration

[Smith, *Justice and the Poor* (Charles Scribner's Sons), pp. 68-72.]

Arbitration, as a method of settling disputes, is more generally and better known than conciliation. It stands midway between conciliation and court litigation. Like the former, it is a method that can be used only by consent, and so differs from judicial procedure which rests on compulsion. But once the agreement is made, and the arbitration tribunal has entered its award, the enforceability of the decision rests not on consent as in conciliation, but on the compulsion of legal process by judgment and execution. . . .

Arbitration as provided for by statute in effect permits disputants to create a tribunal of their own either by agreeing on the persons to arbitrate or by agreeing to use the arbitration machinery of some private organization, as a chamber of commerce. This agreement is generally called a "submission," and if it contains a provision to that effect, the law permits the award to be entered as a court judgment and enforced in like manner. The great defect in the American statutes is that either party may, after the submission and any time before the final award, revoke his agreement and thereby annul all the proceedings.

The arbitration proceeding is obviously one not conducted according to the legal rules of procedure and evidence. So long as the arbitrators give the disputants a fair chance to present their full case, they can conduct the hearings as they like, and accept such evidence as seems to them helpful. More important, statutory arbitration need not at all be a determination of right and wrong according to rules of substantive law. An award may be revoked for fraud, corruption, or serious and prejudicial misconduct, just as the decisions of a court may be set aside on like grounds, but there is no authority for revoking a finding because it fails to accord with rules of law. . . .

Arbitration has been coming more and more generally into use through the insistence of merchants acting through their trade groups or chambers of commerce. Under the energetic guidance of Charles L. Bernheimer a splendid organization has, since 1911, been built up under authority of the Chamber of Commerce of the State of New York, which has been followed elsewhere, notably by the Chicago Association of Credit Men. This revival has been forced by three considerations,—first, a desire for a decision by an expert having personal knowledge of trade conditions and customs, a thing which the courts have never been able to afford; second, a hope of supplanting the enmity provoking litigious method with an amicable procedure which would not interrupt



business relationships; and thirdly and chiefly, a determination to escape from the intolerable delays of the regular administration of justice. . . .

Commercial arbitration has not solved expense because it has not tried to. Costs and fees have not been prohibitive to business men. It has, however, served to eliminate delay, it has greatly reinforced the idea of conciliation, of which the New York Chamber of Commerce Arbitration Committee says, "Perhaps the most important work of your Committee has been in the way of conciliation," and it has, through its informal procedure, occasionally been of direct assistance to poor persons. For us, its great significance is that it has revived the idea, and delivered a body blow to that legal Cerberus of pleading, procedure, and evidence by proving that justice can be as faithfully, more satisfactorily to the parties, and more quickly administered, even as to claims as large as one hundred and fifty thousand dollars, through an informal tribunal which has found no necessity for technical pleadings, or for a predetermined detailed procedure, or for excluding the kind of logical evidence which all the world, except the courts, uses in making its decisions. . . .

A judicial arbitration of a small claim is exactly the same as a proceeding in a small claims court, for the keynote of both is an informal procedure which makes for despatch, saves expense, and generally renders the attorney unnecessary. And in both the judgment rendered is in accordance with substantive law. Arbitration, however, is not limited to small claims, but extends to all claims, irrespective of amount.

... In their effect on the problem of denial of justice and in the solution that they afford, small claims courts, conciliation, and arbitration have much in common. In all three, court costs cease to prohibit, for they have been minimized or abolished. The proceedings, in their very nature, make despatch easy and delay difficult. In parallel ways they avoid the fundamental difficulty of the expense of counsel by making the employment of attorneys unnecessary. In all conciliation, in the large proportion of small claims, and generally in matter submitted to arbitration, after rules of pleadings, procedure, and evidence have been eliminated, there is nothing left for the lawyer to do. . . .

#### 140. THE GRAND JURY

The grand jury is a long-established institution in the administration of criminal justice, but it is coming to be regarded in many quarters as a cumbrous and unnecessary adjunct. In a number of states it has been reduced to a position where

it is used only occasionally in unusual cases, while for ordinary use the filing of an information by the prosecuting attorney is substituted.

[*Illinois Constitutional Convention Bulletins*, 1920, pp. 832-835.]

**Criticisms of the grand jury.** In cases where the accused is arrested on a complaint, and examined by a justice of the peace or a judge, if it is found that an offense cognizable in the circuit court has been committed, and that there is probable reason for believing the accused guilty, the accused is bound over to await the action of the grand jury. The grand jury must find an indictment against the accused before he can be brought to trial. In this procedure it is necessary for the state's witnesses to appear before the examining magistrate, the grand jury and the trial court. It is urged that this is too great a hardship upon the witnesses.

It is also contended that in such cases the action of the grand jury is superfluous, because it acts merely as a ratifying body for the examining magistrate or the state's attorney.

One recent author defends the grand jury as follows: "There are many cases of a trifling nature which are returned by the committing magistrates and when brought before the grand jury the indictments are ignored. In counties where the volume of business is small, it would be of little consequence if the grand jury found true bills even in these cases, but in counties where the volume of business is large . . . it then becomes of vital importance that there should be a tribunal to sift from the great mass of cases those which are too trifling in their nature to receive further prosecution; and this is a duty which could not well devolve upon one single officer, for unless testimony was heard by him, there would be no feasible way to determine which cases should be prosecuted and which ignored. If evidence is therefore to be heard, it is wiser that it be heard and considered by a body impartially selected from the people than by a single officer whose training would incline him to find grounds upon which the prosecution might be sustained."

Some objection is made to grand jury proceedings because the accused has no opportunity to explain away the evidence. The proceedings are *ex parte*, the grand jury hearing only the evidence for the state. Where the accused is arrested and brought before a judge or a justice of the peace for a preliminary examination evidence both for and against the accused is heard.

It is also contended that the examination by the grand jury is not an economical proceeding. In Cook County, 276 grand jurors served during each of the years of 1916 and 1917, and only 600 persons were

drawn for grand jury service during each of these years. The fees of grand jurors is three dollars per day.

The grand jury system has been criticised on account of its secret deliberations. It is urged that secrecy tends to permit unfounded and malicious accusations to be made by parties who would not dare to act openly; and that, regardless of the ultimate outcome of the prosecution of an indictment founded upon an ungrounded charge, the reputation of the accused must suffer. In answer to this, it is pointed out that the statute requires that the names of all witnesses shall be endorsed upon the indictment, and also, that the secret deliberations permit people more readily to bring and have investigated complaints against the more powerful criminals.

In answer to the argument that the grand jury is a useless institution, and that its work could be performed by allowing the state's attorney to file an information, it is urged that in cases where the accused is powerful and has influence, or is a friend of the state's attorney, this official may hesitate to act; that in such instance a body of representative men of the county may be found to be better fitted to act, and evidence may be submitted to the grand jury, which the state's attorney would hesitate to submit to a magistrate, where he had to assume the responsibility for instituting the proceedings.

Assuming the continuance of the grand jury, it is contended that there is no necessity for a grand jury consisting of twenty-three jurors, as a smaller number would be sufficient.

**The grand jury in other states.** Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia and Wisconsin have no constitutional provisions requiring indictments by a grand jury. The statutes of these states, however, require or permit grand juries. The constitutions of all other states contain provisions requiring or permitting indictments by a grand jury in criminal cases, or in certain classes of criminal cases. In some of these states, indictment by a grand jury is optional, other methods being provided to replace the indictment. A few states require indictment by a grand jury only in capital cases or in cases where the punishment is by imprisonment for life. In several states the grand jury may be abolished, and in some states the number constituting a grand jury has been fixed at less than the common law number.

In twenty-five states the constitutions require indictments for certain crimes. Nearly all of these states require indictments only for felonies, but the constitutions of Arkansas, Nebraska, New Jersey, South Carolina, Tennessee, and West Virginia require indictments for all or some

misdeemeanors, as well as for felonies. Connecticut requires an indictment only for those crimes in which the punishment may be by death or imprisonment for life. The Louisiana constitution requires an indictment in capital cases, but in other cases the accused may be held to trial on information.

The constitutions of Colorado, Nebraska, North Dakota and Wyoming provide that the legislature may change, regulate or abolish the grand jury. The constitution of Nebraska permits the legislature to provide for holding persons to answer for criminal offenses on information of a public prosecutor. The Iowa constitution permits the legislature to provide for holding persons to answer for any criminal offense without the intervention of the grand jury. The constitution of Indiana contains a provision that the legislature may abolish or modify the grand jury system. The constitutions of Alabama, Arkansas, Mississippi and Delaware permit the legislatures to dispense with the grand jury in misdemeanors and to authorize such prosecutions before justices of the peace or in inferior courts.

The constitutions of Arizona, California, Missouri, Montana, Nevada, Oklahoma, South Dakota, Utah, and Washington provide that cases may be prosecuted by information as well as by indictment. An examination and commitment by a magistrate is a preliminary requirement to the filing of an information in Arizona, California, Idaho, Montana, Oklahoma and Utah. The constitution of Louisiana which requires an indictment in capital cases, permits information in all other cases. . . .

**Retention of grand jury for occasional use.** In several of the states in which information and indictment are concurrent remedies, a grand jury can be called only upon an order of the judge of a court having power to try and determine felonies. A provision to this effect is found in the constitutions of Missouri, Oklahoma, Arizona, Montana, Idaho and Utah. The Utah constitution provides "no grand jury shall be drawn or summoned unless in the opinion of the judge of the district, public interest demands it." The Arizona constitution provides: "Grand juries shall be drawn and summoned only by order of the superior court." The constitutional provision relating to convening of grand juries in Missouri, Montana and Idaho are similar to those in Utah and Arizona. The constitution of Oklahoma provides that the grand jury shall be convened by the judge upon his motion, or shall be ordered by the judge upon the filing of a petition signed by 100 resident tax payers of the county. Michigan, Kansas, Washington, California and South Dakota have constitutional or statutory provisions which permit an infrequent use of the grand jury.

## 141. STATE JUDICIAL COUNCILS

There are many needed changes and improvements in the system of courts and in the administration of justice, which might be brought about by action of the legislature or of the courts themselves. These agencies, however, are usually too busy with their regular duties to give the requisite time and study to the formulation of these needs in a definite way. Hence, special agencies are needed for this purpose—a need which has led to the movement for the creation of judicial councils in many states.

[Pressly S. Sikes, "The Work of Judicial Councils," *American Political Science Review*, vol. 29, pp. 456-472 (June, 1935).]

The members of a judicial council, if not *ex-officio*, are usually chosen, or designated, by the governor, the chief justice of the state's highest court, or the president or governing board of the state's bar association, or by a combination of two or all of these methods.

Councils are usually established by a legislative enactment, although the California council was created through a constitutional amendment,<sup>1</sup> and in Idaho,<sup>2</sup> South Dakota,<sup>3</sup> Utah,<sup>4</sup> and Oklahoma<sup>5</sup> they are creations of the respective state bar associations, with or without express legislative authorization.

According to Professor Sunderland, "there are two responsibilities which appear to be placed upon the judicial council. The first is express, the second is implied. The first is a very definite responsibility for formulating and presenting to the proper authorities suitable measures for procedural reform. The second is a very indefinite responsibility for promoting and facilitating the adoption of the measures proposed."<sup>6</sup> To these responsibilities one might add a third, i.e., that of expediting the business of the courts through the formulation of rules and the supervision of the courts. It is true that this third responsibility is not usually conferred upon councils; but the council in California has such a responsibility, as is seen from the statements in the second paragraph below.

Most judicial councils are what are called "weak" councils—that is, they have advisory powers only. The Massachusetts council exemplifies this type. It is empowered to make a "continuous study of the organization, rules, and methods of procedure and practice of the judicial system of the commonwealth, the work accomplished, and the results produced by that system and its various parts." The council is required

<sup>1</sup> Constitution of California, Art. VI, Sec. 1a (amendment).

<sup>2</sup> 5 Proceedings of Idaho State Bar 101 (1929).

<sup>3</sup> 2 South Dakota Bar Journal 39 (Oct., 1933).

<sup>4</sup> Utah Bar Bulletin, October 1931, 13.

<sup>5</sup> 17 Journal of the American Judicature Society 167 (April, 1934).

<sup>6</sup> Edson R. Sunderland, "Organization and Function of Judicial Councils," 9 *Indiana Law Journal* 479 (May, 1934).



to "report annually on or before December first to the governor upon the work of the various branches of the judicial system." It "may also from time to time submit for the consideration of the justices of the various courts such suggestions in regard to rules of practice and procedure as it may deem advisable."<sup>7</sup>

The judicial council of California illustrates the strong type. Besides advisory functions similar to those possessed by the Massachusetts council, it may "adopt or amend rules of practice and procedure for the several courts not inconsistent with laws that are now or that may hereafter be in force; and the council shall submit to the legislature, at each regular session thereof, its recommendations with reference to amendments of, or changes in, existing laws relating to practice and procedure." In addition, it is provided that "the chairman shall seek to expedite judicial business and to equalize the work of the judges, and shall provide for the assignment of any judge to another court of a like or higher jurisdiction to assist a court or judge whose calendar is congested, to act for a judge who is disqualified or unable to act, or to sit and hold court where a vacancy in the office of judge has occurred." The constitution directs that "the several judges shall cooperate with the council, shall sit and hold court as assigned, and shall report to the chairman at such times and in such manner as he shall request respecting the condition, and manner of disposal, of judicial business in their respective courts."<sup>8</sup>

It appears, however, that most of the work of a majority of the councils consists of conducting surveys, assembling information, and recommending proposed changes in organization and procedure of the various courts of the respective states. . . .

A great many people, especially those inclined to be cynical, might contend that the creation of a judicial council is merely establishing "another commission," or "more bureaucracy," or perhaps another scheme for giving deserving politicians "junketing trips." It is true that councils have not been uniformly successful. On the whole, however, they appear to take their tasks seriously, and are rendering substantial, perhaps distinguished, service. . . .

In general, it may be said that a council's methods of work depend largely upon whether the state is a small or a large one, and upon whether the council has a paid secretary and adequate research facilities. The most successful councils do not attempt to function as things apart. Rather, they cooperate with bar associations, law schools, civic bodies, and other organizations, including, of course, the executive, legislative, and judicial branches of the respective state governments.

<sup>7</sup> *Acts and Resolves of Massachusetts*, 1924, 228.

<sup>8</sup> Constitution of California, Art. VI, Sec. 1a (amendment).



## CHAPTER XXV

### STATE FINANCE

#### 142. THE CUSTODY OF STATE FUNDS

Since the amount of money collected and disbursed by the states has greatly increased during recent years, it follows that the safe-keeping of the public funds has become a problem of increasing importance. It is, moreover, not only highly desirable that the funds should be safely kept but also that the state should receive a reasonable rate of interest upon them. The following selection gives some indication of present conditions together with suggestions for improvement.

[Faust, *The Custody of State Funds* (National Institute of Public Administration), pp. 62-65, 71-72.]

The official machinery vested with the responsibility of designating the public depositories in the majority of states consists of a depository board. Twelve of the states vest this authority exclusively in the state treasurer. The most important work of the depository board is to designate the depositories, to fix the rate of interest on the public deposits, and to approve the security pledged to guarantee safe-keeping of the funds and compliance with the conditions imposed. These boards rarely exercise any general supervisory powers over the funds in the hands of the bank depositories. In the distribution of the funds among the designated depositories, the discretion of the treasurer is still the important factor. He is also a member of the depository board. The interposition of the depository board has meant releasing the treasurer from liability for the funds in the hands of the depositories. An efficiently managed state depository system requires the close co-operation of the treasurer, auditor, director of finance, and banking commissioner.

We are accustomed to regard treasurers as ministerial officers whose main duties are to receive and to disburse the public funds as provided by law. A treasurer exercises, however, broad discretionary powers in handling the funds in the interval between their receipt and their disbursement. The emergence of the large treasury balances has added very considerably to the significance of this part of the treasurer's duties. Theoretically it seems desirable that one charged with the administration of a large treasury balance should not be hedged in by all sorts of restrictions, which will inevitably handicap him, if he is to take advan-

tage of every opportunity to handle the funds in such a way that they will be of maximum service to the state. It is readily conceivable that the most effective handling of cash might occur where statutory regulations were entirely absent. After all the main problem lies in the honesty and the competency of the official custodians. It has long been a commonplace that only by developing higher standards in the public service can we expect to achieve the best results in the performance of the public functions. But we cannot expect to improve the standards of official ethics, unless we first elevate the present low standard of public ethics. The persistence of conditions described in Pennsylvania and Illinois can only be ascribed to a tolerant and complacent public opinion. In no public office are the effects of a sluggish public conscience more clearly recognizable than in the office of state treasurer. Traditionally, insidious influences and subtle temptations have invested the office. Politically the state treasurership has been a prize much sought after, mainly because it presents the incumbent with unlimited opportunities to build up a strong personal following among men of wealth and influence. Men succeeding to the office with the most honest intentions have again and again succumbed to the innumerable temptations for personal advantage which have been its inherent attributes. The tendency of legislation has been, therefore, to attempt an elimination of the evils by restricting more and more the discretion of the treasurer in handling the funds entrusted to his custody. But the most important safeguard against treasury mismanagement and corruption is continuous criticism and checking of a treasurer's administration by an independent controller. Treasury records should be subject to automatic daily audit.

Under the old independent treasury system the safety of the state cash alone received consideration. The expanding volume of treasury transactions has made the custody of state funds a twofold problem of security and economy. Under the bank depository method of handling the public cash, it is still recognized that the factor of security must always have prior consideration. Obviously it would be false economy for a state to imperil the integrity of the funds, primarily to secure a large income for the use thereof. At the same time it should be recognized that the strict application of principles of economical administration of receipts and expenditures might conceivably reduce to relative unimportance the entire problem of the safekeeping of the treasury funds. By effecting a close correlation between receipts and expenditures, the necessity of carrying large cash balances would be entirely eliminated. The states have made little progress in this direction. This stage in state fiscal administration will not be reached until we have

perfected more scientific methods in this field, and have been able to overcome the public inertia and the official unwillingness traditionally resisting their application.

In distributing the funds among the designated depositories the two important factors considered are the financial strength of the depository and the amount of security it is willing to pledge to guarantee safe-keeping of the funds. It is observed that approximately only one-half the states make any reference to this basis, that is that the capital stock and surplus of the depository shall be a limitation on the amount of state funds it may receive. It is argued that since depositories must pledge security to protect the funds, reference to the capital stock and surplus of the depository is no longer of much consequence. There are, however, obvious dangers lurking in such a situation. A comparatively insignificant bank can be made the instrument whereby a small group with the proper political connections may use the public funds to enhance their private fortunes, while operating ostensibly within legal bounds. Reference to the capital stock and surplus of the depositories, in the distribution of the funds, where required by law, reduces the possibilities of this form of treasury manipulation. But if these limitations are too rigid, they may cause unnecessary inconvenience and embarrassment to the treasurer, especially during times when the treasury funds have temporarily or unexpectedly expanded.

. . . . .

One of the most vital elements in the whole problem of the custody of state funds is the element of publicity. In almost all the states at the present time a veil of secrecy surrounds the administration of the public deposits. Many of the evils that have sprung up in the several states in connection with the handling of the state funds might be eliminated if adequate publicity were given to the relations between the depository banks and the official custodian. Banks should be required to include in their published statements the amount of their state deposit. Only three states have such a requirement. The state treasurer, furthermore, should be required to issue periodically and publish in the newspapers statements showing the amount of funds on deposit in each of the several state depositories. At least once a year the treasurer should be required to publish a report showing interest receipts by banks, the rate of interest each bank pays, and the average balance of state funds carried in each bank during the year.

Finally, to sum up the situation with respect to the custody of state funds, it is important to recognize first of all that the growing expansion

of government business with the consequent large treasury balances demands the elimination of corruption and misfeasance in the handling of state funds, the abandonment of wasteful and inefficient methods, and the administration of the public funds with the same scrupulous care that the private funds of efficient business corporations are managed. The specific suggestions made by the writer toward the attainment of this end are: the distribution of state funds on the basis of the capital and surplus of the banks; the pledging of collateral securities or surety company bonds by the banks to protect the deposits; the centralization of treasury control to increase the available supply of cash and to prevent the dissipation of funds among many departments and offices; the stabilization of treasury accounts by arranging for active and inactive depositories and time deposits; the introduction of competitive bidding to secure the highest rates consistent with safety for the funds; the elimination of practices that impair the credit of the state, such as failing to pay obligations promptly or issuing interest bearing warrants; the reduction of interest charges by substituting revenue notes for tax anticipation warrants, by not issuing bonds until the time the funds are actually needed, by eliminating the special funds rendering the treasury immobile, and by aiming to secure closer co-operation between the state and the depository banks; the reduction of cash balances by correlating receipts and disbursements and by making temporary investments of surplus funds. But regardless of statutory safeguards and mandatory provisions, the first consideration must always be the character of the administrative personnel entrusted with the duties and the responsibilities of the treasury office.

### 143. THE TREND OF STATE EXPENDITURES

The increasing cost of running the state governments is well known. The following article not only indicates the extent to which the increase has gone, but also points out the particular objects of expenditure in which the greatest increases have occurred. It is significant also that the trend here indicated occurred during normal times, before the enormous expansion of governmental activity and expenditure because of the depression and under the "New Deal."

[A. F. Macdonald, in article reprinted from *The Annals of the American Academy of Political and Social Science*, Philadelphia, Pa., May, 1924, vol. CXIII, no. 202, pp. 8-15.]

In the year 1913 the forty-eight states of the Union spent about 382 million dollars for governmental purposes. In 1922 they spent somewhat in excess of one billion, 280 million dollars. The cost of operat-

ing our state governments increased, therefore, 235 per cent in the nine-year period from 1913 to 1922. Made without explanation or reservation, this is a rather startling statement. But there are two factors which obviously must be taken into consideration in making any comparison of governmental expenditures during the last decade. One is an increase of 35 per cent in the population of the United States; the other is an increase of 49 per cent in the general level of prices.

Reduced to a per capita basis, the increase in the governmental expenditures of the states from 1913 to 1922 was 199 per cent. Costs rose gradually until 1919; after that year they mounted rapidly. The following table indicates per capita costs for the period:

1913	.....	\$3.95
1915	.....	5.03
1917	.....	5.08
1919	.....	6.09
1921	.....	9.46
1922	.....	11.82

The figures are not fairly comparable, however, until allowance is made for fluctuations in the price level during the last decade. The United States Bureau of Labor compiles monthly an index number based on the wholesale prices of 404 commodities; and the per capita expenditures of the states when weighted in accordance with this index number, indicate with reasonable accuracy the real increase in the cost of running our state governments. The table below gives per capita governmental-cost payments of the states in terms of 1913 dollars:

1913	.....	\$3.95
1915	.....	4.98
1917	.....	2.87
1919	.....	2.95
1921	.....	6.43
1922	.....	7.93

When reduced to a per capita basis and measured in terms of 1913 dollars, therefore, state expenditures for governmental purposes exactly doubled in the period from 1913 to 1922. One hundred per cent represents the true rate of increase. In 1917 and 1919, as shown by the table, the states spent relatively less than in the year immediately preceding the outbreak of the World War. This decrease was due to the large part played by salaries in state costs. Salaries and wages always lag behind commodity costs in a period of rising prices, and their action during the last few years proved no exception to the general rule. Until 1920 the states were paying salaries based in large measure on the pre-

war price scale. By 1921, however, this discrepancy had been adjusted, and did not need to be considered in comparing state expenditures.

An actual increase of 100 per cent in the per capita cost of running our state governments within the short space of nine years calls for more than a passing comment. It represents a real burden on the taxpayers of the nation. During the same period municipal expenditures increased less than twenty per cent, due allowance being made for growing population and rising prices. A comparison with the costs of the Federal Government cannot fairly be made, because of the effect of the war on national finance.

Whether the taxpayers are receiving an equivalent for the rapidly mounting costs of their respective state governments in the form of more and better services is a pertinent question. In recent years the states have been called upon to perform many functions formerly left to private initiative. Education and charity, for example, have been transferred in large part from private to governmental agencies. New duties entail new expense, even if carried out in niggardly fashion. And the work of the states has been performed in anything but a parsimonious manner. The people have consistently laid more stress on raising the standard of service than on reducing the expenses of government. Better training for teachers is demanded instead of lower salaries. Concrete highways at a construction cost of \$35,000 a mile are preferred to cheap dirt roads.

The demand of the American people for new services and for higher standards undoubtedly accounts in part for the rapidly increasing cost of operating our state governments. Whether it offers an adequate explanation can be determined only by examining in detail the various items of state expenditure, and ascertaining the purposes for which state money is being spent. [Then follows such a detailed examination.]

Armed with this long and rather tedious array of statistics, we are in a position to draw some conclusions as to the recent trend of state expenditures. Governmental costs, we find, are rising steadily, but these increases are due almost entirely to the expansion of governmental activity and to the improvement of governmental service. Eliminating price fluctuations, there has been no material increase in the last decade in the per capita cost of operating our state executive, legislative and judicial departments. The same is true of protection to person and property, while public recreation has suffered a decrease. Education, charities, hospitals and corrections have all been affected by the public demand for higher standards. Better equipped schools and better trained teachers



are everywhere regarded as a necessity. The care of the physically, mentally and economically unfit is coming to be regarded as a science. These changing concepts mean larger appropriations to maintain the higher standards, but the increases have not been large. The cost of public health and sanitation work has risen more rapidly in the last decade. Special attention paid to the prevention and treatment of communicable diseases has resulted in an increase of 85 per cent.

But the most startling development of the last decade in the field of state finance has been the rapid growth of one or two functions which were so insignificant at the beginning of the present century that they were almost lost in the long list of state expenditures. Chief of these is highways. A rise of 364 per cent in disbursements for highway maintenance between 1913 and 1922, and an increase which must have been nearly 1,000 per cent in payments for road construction, go far toward explaining the increased cost of operating our state governments. This is particularly true when we remember that differences due to a growing population and to an increase in the general level of prices have been eliminated. The rate of increase would otherwise be nearly twice as great. The development and conservation of our natural resources, an item not even recognized in the Census Bureau's classification of state expenditures in 1913, had reached the surprising sum of 38 cents per capita by 1922. The ultimate result of a policy of conservation is to save the natural wealth of the states, but its immediate effect is to require the outlay of more money.

It seems clear that there will be no considerable reduction, in the immediate future, at least, of state operating costs. The people are demanding more and better services from their state governments, and they are receiving what they ask. *Vox populi, vox dei*. But when in the same breath they demand lower taxes, their collective voice loses some of its divine quality. Only foolish mortals would expect to pay less and receive more. The people are getting better roads and more of them; they are getting more schools and better teachers—but they are paying the bills.

#### 144. THE STATE BUDGET

An important reform in financial procedure which has been widely introduced into the states within recent years is the executive budget. The great increase in state expenditures has made economical management of state finances even more necessary than formerly. The executive budget is a move in this direction in that it places the initiative in the hands of the governor and thus concentrates responsibility for the estimates. Usually the legislature is legally free to change the governor's estimates as it sees fit, but in Maryland it is limited in this respect by the

Constitution. The voters of New York state in November, 1927, also adopted an amendment which provides for a genuine executive budget and greatly strengthens the governor's financial control.

### a. The Maryland Budget Amendment

[Constitution of Maryland, Art. III, sec. 52, in Kettleborough, *State Constitutions*, pp. 626-628.]

SEC. 52. The general assembly shall not appropriate any money out of the Treasury except in accordance with the following provisions:

Sub-Section A: Every appropriation bill shall be either a Budget Bill, or a Supplementary Appropriation Bill, as hereinafter mentioned.

Sub-Section B: First: Within twenty days after the convening of the General Assembly (except in the case of a newly elected Governor, and then within thirty days after his inauguration), unless such time shall be extended by the general assembly for the session at which the budget is to be submitted, the governor shall submit to the general assembly two budgets, one for each of the ensuing fiscal years. Each budget shall contain a complete plan of proposed expenditures and estimated revenues for the particular fiscal year to which it relates; and shall show the estimated surplus or deficit of revenues at the end of such year. Accompanying each budget shall be a statement showing: (1) the revenues and expenditures for each of the two fiscal years next preceding; (2) the current assets, liabilities, reserves and surplus or deficit of the State; (3) the debts and funds of the State; (4) an estimate of the State's financial condition as of the beginning and end of each of the fiscal years covered by the two budgets above provided; (5) any explanation the governor may desire to make as to the important features of any budget and any suggestion as to methods for the reduction or increase of the State's revenue.

Second. Each budget shall be divided into two parts, and the first part shall be designated "Governmental Appropriations" and shall embrace an itemized estimate of the appropriations: (1) for the general assembly as certified to the governor in the manner hereinafter provided; (2) for the executive department; (3) for the judiciary department, as provided by law, certified to the governor by the comptroller; (4) to pay and discharge the principal and interest of the debt of the State of Maryland in conformity with Section 34 of Article III of the Constitution, and all laws enacted in pursuance thereof; (5) for the salaries payable by the State under the Constitution and laws of the State; (6) for the establishment and maintenance throughout the State of a thorough and

efficient system of public schools in conformity with Article VIII of the Constitution and with the laws of the State; (7) for such other purposes as are set forth in the Constitution of the State.

Third. The second part shall be designated "General Appropriations," and shall include all other estimates of appropriations.

The Governor shall deliver to the presiding officer of each House the budgets and a bill for all the proposed appropriations of the budgets clearly itemized and classified; and the presiding officer of each house shall promptly cause said bill to be introduced therein, and such bill shall be known as the "Budget Bill." The Governor may, before final actions thereon by the General Assembly, amend or supplement either of said budgets to correct an oversight or in case of an emergency, with the consent of the general assembly by delivering such an amendment or supplement to the presiding officers of both houses; and such amendment or supplement shall thereby become a part of said budget bill as an addition to the items of said bill or as a modification of or a substitute for any item of said bill such amendment or supplement may affect.

The general assembly shall not amend the budget bill so as to affect either the obligations of the state under Section 34 of Article III of the Constitution, or the provisions made by the laws of the State for the establishment and maintenance of a system of public schools, or the payment of any salaries required to be paid by the State of Maryland by the Constitution thereof; and the general assembly may amend the bill by increasing or diminishing the items therein relating to the general assembly, and by increasing the items therein relating to the judiciary, but except as hereinbefore specified, may not alter the said bill except to strike out or reduce items therein, provided, however, that the salary or compensation of any public officer shall not be decreased during his term of office; and such bill when and as passed by both houses shall be a law immediately without further action by the governor.

Fourth. The governor and such representatives of the executive departments, boards, officers and commissions of the State expending or applying for State's money, as have been designated by the governor for this purpose, shall have the right, and when requested by either house of the legislature, it shall be their duty to appear and be heard with respect to any budget bill during the consideration thereof, and to answer inquiries relative thereto.

Sub-Section C: Supplementary Appropriation Bills: Neither House shall consider other appropriations until the Budget Bill has been finally acted upon by both Houses, and no such other appropriation shall be valid except in accordance with the provisions following: (1) Every such

appropriation shall be embodied in a separate bill limited to some single work, object or purpose therein stated and called herein a Supplementary Appropriation Bill; (2) Each Supplementary Appropriation Bill shall provide the revenue necessary to pay the appropriation thereby made by a tax, direct or indirect, to be laid and collected as shall be directed in said Bill; (3) No Supplementary Appropriation Bill shall become a law unless it be passed in each house by a vote of a majority of the whole number of the members elected, and the yeas and nays recorded on its final passage; (4) Each Supplementary Appropriation Bill shall be presented to the governor of the state as provided in Section 17 of Article II of the Constitution and thereafter all the provisions of said Section shall apply.

Nothing in this amendment shall be construed as preventing the legislature from passing at any time in accordance with the provisions of Section 28 of Article III of the Constitution and subject to the Governor's power of approval as provided in Section 17 of Article II of the Constitution an appropriation bill to provide for the payment of any obligation of the State of Maryland within the protection of Section 10 of Article I of the Constitution of the United States.

Sub-Section D: General Provisions: First. If the Budget Bill shall not have been finally acted upon by the legislature three days before the expiration of its regular session, the Governor may, and it shall be his duty to issue a proclamation extending the session for such further period as may, in his judgment, be necessary for the passage of such Bill; but no other matter than such Bill shall be considered during such extended session except a provision for the cost thereof.

Second. The Governor for the purpose of making up his budgets shall have the power, and it shall be his duty, to acquire from the proper State officials, including herein all executive departments, all executive and administrative offices, bureaus, boards, commissions, and agencies expending or supervising the expenditure of, and all institutions applying for State moneys and appropriations, such itemized estimates and other information, in such form and at such times as he shall direct. The estimates for the Legislative Department, certified by the presiding officer of each house, of the judiciary, as provided by law, certified by the Comptroller, and for the public schools, as provided by law, shall be transmitted to the Governor, in such form and at such times as he shall direct, and shall be included in the budget without revision.

The Governor may provide for public hearings on all estimates and may require the attendance at such hearings of representatives of all agencies, and of all institutions applying for State moneys. After such

public hearings he may, in his discretion, revise all estimates except those for the legislative and judiciary departments, and for the public schools as provided by law.

Third. The Legislature may, from time to time, enact such laws, not inconsistent with this Section, as may be necessary and proper to carry out its provisions.

Fourth. In the event of any inconsistency between any of the provisions of this Section and any of the other provisions of the Constitution, the provisions of this Section shall prevail. But nothing herein shall in any manner affect the provisions of Section 34 of Article III of the Constitution of any laws heretofore or hereafter passed in pursuance thereof, or be construed as preventing the Governor from calling extraordinary sessions of the Legislature, as provided by Section 16 of Article II, or as preventing the Legislature at such extraordinary sessions from considering any emergency appropriation or appropriations.

If any item of any appropriation bill passed under the provisions of this Section shall be held invalid upon any ground, such invalidity shall not affect the legality of the Bill or of any other item of such Bill or Bills.

#### **b. The New York Budget Amendment**

[Adopted Nov. 8, 1927. Text in *Constitutions of the States and United States* (compiled for the New York Constitutional Convention, 1938, by Rodney L. Mott and Wilber L. Hindman), pp. 1110-1111.]

#### **ARTICLE IV-A**

§ 1. On or before the fifteenth day of October in the year nineteen hundred and twenty-eight and in each year thereafter the head of each department of the State government, except the Legislature and judiciary, shall submit to the Governor itemized estimates of appropriations to meet the financial needs of such department, including a statement in detail of all moneys for which any general or special appropriation is desired at the ensuing session of the Legislature, classified according to relative importance and in such form and with such explanation as the Governor may require. Copies of such estimates shall be simultaneously furnished to the designated representatives of the appropriate committees of the Legislature for their information.

The Governor, after hearings thereon, at which he may require the attendance of heads of departments and their subordinates, shall revise such estimates according to his judgment. The representatives aforesaid of the committees of the legislature shall be invited to attend such



hearings, and under regulations to be provided by law shall be entitled to make inquiry in respect to the estimates and the revision thereof. Itemized estimates of the financial needs of the Legislature certified by the presiding officer of each house and of the judiciary certified by the Comptroller shall be transmitted to the Governor on or before said fifteenth day of October for inclusion in the budget without revision but with such recommendation as he may think proper.

§ 2. On or before the fifteenth day of January next succeeding (except in the case of a newly elected Governor and then on or before the first day of February) he shall submit to the Legislature a budget containing a complete plan of proposed expenditures and estimated revenues. It shall contain all the estimates so revised or certified and clearly itemized, and shall be accompanied by a bill or bills for all proposed appropriations and reappropriations; it shall show the estimated revenues for the ensuing fiscal year and the estimated surplus or deficit of revenues at the end of the current fiscal year together with the measures of taxation, if any, which the Governor may propose for the increase of the revenues. It shall be accompanied by a statement of current assets, liabilities, reserves and surplus or deficit of the State; statements of the debts and funds of the State; an estimate of its financial condition as of the beginning and end of the ensuing fiscal year; and a statement of revenues and expenditures for the two fiscal years next preceding said year in form suitable for comparison. The Governor may before final action by the Legislature thereon, and not more than thirty days after submission thereof, amend or supplement the budget; he may also with the consent of the Legislature, submit such amendment or a supplemental bill at any time before the adjournment of the Legislature. A copy of the budget and of any amendments or additions thereto shall be forthwith transmitted by the Governor to the Comptroller.

§ 3. The Governor and the heads of departments shall have the right, and it shall be the duty of the heads of departments when requested by either house of the Legislature, to appear and be heard in respect to the budget during the consideration thereof, and to answer inquiries relevant thereto. The procedure for such appearance and inquiries shall be provided by law. The Legislature may not alter an appropriation bill submitted by the Governor except to strike out or reduce items therein, but it may add thereto items of appropriation provided that such additions are stated separately and distinctly from the original items of the bill and refer each to a single object or purpose; none of the restrictions of this provision, however, shall apply to appropriations for the Legislature



or judiciary. Such a bill when passed by both houses shall be a law immediately without further action by the Governor, except that appropriations for the Legislature and judiciary and separate items added to the Governor's bills by the Legislature shall be subject to his approval as provided in section nine of article four.<sup>1</sup>

§ 4. Neither house shall consider further appropriations until the appropriation bills proposed by the Governor shall have been finally acted on by both houses; nor shall such further appropriations be then made except by separate bills each for a single work or object, which bills shall be subject to the Governor's approval as provided in section nine of article four. Nothing herein contained shall be construed to prevent the Governor from recommending that one or more of his proposed bills be passed in advance of the others to supply the immediate needs of government or to meet an emergency.

## 145. FINANCIAL METHODS IN ILLINOIS

Illinois was the first state to adopt any far-reaching scheme of administrative reorganization. This was accomplished by the passage of the so-called Civil Administrative Code of 1917, to which reference has previously been made. At the same time better budget methods were introduced, and other notable improvements in financial methods, which are well described by the first Director of Finance in that state.

### a. Functions of Department of Finance

[Omar H. Wright, in *Illinois Blue Book, 1919-20*, pp. 11-14.]

The Department of Finance is an entirely new function in Illinois State government. It took over no work performed by any board or commission. There were no precedents or set rules to follow. As created by the Civil Administrative Code the department discharges supervisory rather than operating functions. Its work brings it into intimate contact with the remaining eight departments and other departments and commissions rather than with the public.

### DUTIES OF THE DEPARTMENT

Its duties more specifically are:

- (1) To prescribe and install a uniform system of bookkeeping, accounting, and reporting;
- (2) To examine into the accuracy and legality of the accounts and expenditures of other departments;

<sup>1</sup> That is, the ordinary or the item veto may be applied.

- (3) To examine and approve, or disapprove, all bills, vouchers and claims against the other departments;
- (4) To prepare a budget for submission to the Governor; and
- (5) To formulate plans for better coordination of departments.

In addition to performing such specific duties the director acts as the financial adviser for the departments directly under the Governor's control, and as an observer for him.

The Civil Administrative Code recognizes that discretion is to be given the Director of Finance in prescribing financial and accounting details, making these uniform throughout all the departments.

Practically all of the powers of the department are vested in the director who by rules and regulations provides how such powers shall be administered.

It develops as a matter of common sense rather than law that the other departments consult the Department of Finance before undertaking any unusual matters having to do with these expenditures.

Weekly meetings of the directors have been held and have served to bring out questions of financial policy. In many cases where the Director of Finance has rules on a subject it has been necessary for him to make thorough investigations of the matter in question and all affairs relating to it. These investigations may have ranged from the quality of goods that were supplied in connection with a small bill, to the effects of a given policy of far reaching consequence.

The scope of the Department of Finance in its powers to conduct investigations is most thorough. Nearly everything done by any department finally comes as an expense to be passed upon by the Director of Finance. Thus it will be seen that systematic and thorough investigations are often necessary to put the Department of Finance in possession of facts essential to an equitable decision.

The assistant director was charged with the duties of prescribing and supervising the system of bookkeeping and accounting; the forms and accounts and financial reports and statements. In the discharge of these duties it was necessary to devise and install a system of reports from all departments under the code with the necessary blanks. A plan which was devised has proven successful. With possible modifications, reports can be made invaluable in determining the condition of each division in the code department.

#### MONTHLY REPORTS

Blanks were also prescribed for the monthly reports, which show not only the expenditures made at the end of each month from July 1, 1917,

to the date on which the report was made, but also the bills which have not been paid, and the amount of the contracts which have been entered into or actual orders placed, and for which the goods and invoices have not been received. These reports state the amount of each appropriation which is available for any further expenditure.

The Military and Naval Department was not under the Civil Administrative Code, but by instruction from the Governor, this department prescribed a system of accounting and financial control. Since January 1, 1918, reports have been made by the Adjutant General giving the condition of the financial affairs of his office at the close of each month.

Monthly reports of the same kind are being received from other boards and commissions whose vouchers are subject to the approval of the Governor.

On June 30, 1918, careful summaries were made and the different tables made up by this department from reports received, give the amount of money unexpended or saved by each division from its various appropriations covering the seven standard accounts called operating accounts. These are:

- Salaries and Wages;
- Office Expense;
- Traveling Expense;
- Operating Supplies and Expenses;
- Working Capital;
- School Supplies;
- Repairs.

Equipment, Buildings and Land were not included except where specifically shown.

Appropriations necessarily had to be and were made by the Fiftieth General Assembly on the then existing basis, and when some 30,000 wards of the State must be cared for, the cost cannot be considered, but the needs must be met.

Economy has been practised and savings made where they were never made before, but no extraordinary results can be cited because of more than extraordinary conditions.

The Civil Administrative Code has now been in operation through an entire biennium but the condition of the market for all supplies and materials which the State has had to purchase has been abnormal so that any comparison between the expenditure for the biennium closing June 30, 1917, and the purchases made since that date do not give any satisfactory results. Neither would a comparison between the expendi-

tures of one year in the biennium ending June 30, 1917, and the expenditures of one year of the present biennium be satisfactory because of the tremendous increase in the cost of everything purchased by the State.

It has therefore seemed to us that the most tangible way to determine the real value of the code up to this time lies in the following facts:

The Governor, any State officers, any member of the Legislature or any private citizen can at this time apply to the Finance Department and be given the exact condition of the appropriations which were made to each division of the State Government which is under the operation of the code, as to the amount of money expended, the amount of money involved in the invoices which they have for supplies received and which have not been paid, the amount of money represented by contracts of all kinds which have been placed and for which supplies have not been received and the amount of money still unexpended.

This control of expenditures and the ability to know at all times the financial condition of each division is something which has not been attempted heretofore, and as far as we are informed, is not carried to the extent in any other state that it is in Illinois.

In order to make our plan of operation more successful, this department on February 15, 1919, began to pass upon requests made by divisions for anything and everything which they proposed to purchase, so that we not only know what they have done after the expenditure is made, but we know what they propose to expend before the materials are purchased.

As indicated above, it is always difficult to show by figures exactly what has been accomplished, especially if an attempt is made to compare with some other state for some certain period, or to compare figures in our own State for two different periods, because so many different things may enter into two sets of figures.

Therefore, we can but believe that the accomplishments cited above are really of more value to us, and to any commonwealth where they propose to attempt something of the kind than mere figures which might be furnished.

#### THE NEW BUDGET SYSTEM

It is with considerable satisfaction that this department refers to the work accomplished through the first State budget. So far as we know the adoption of our recommendations of appropriations for all State purposes by the General Assembly is the only instance of the kind in the United States. Some states have their budgets but in no case has the General Assembly accepted the recommendations for a budget so

completely as was done by the Fifty-first General Assembly, just adjourned. Much time and care was spent in the preparation of a budget and every item contained in the \$62,000,000 appropriation bills was thoroughly investigated. The appropriation committees of the Senate and the House of Representatives used due care and precaution in re-investigating the recommendations and much to our gratification, approved them almost in total. Few changes were made by the appropriation committees without consultation with this department. In other words, complete harmony existed between the appropriating bodies of the General Assembly and this department. Our recommendations for office expense, traveling expense, operating expense, and repairs and buildings were accepted almost entirely without change.

In addition to the budget being a great aid to the appropriation committees, it was possible for us to keep the Governor continually advised as to the gross amount of appropriations passed and pending from time to time, thus enabling him to approve or disapprove appropriation bills as they were passed with full knowledge of the probable total.

#### b. Working of Budget System

[*Illinois First State Budget, 1919*, pp. 5-10.]

*His Excellency, Frank O. Lowden, Governor, Springfield, Illinois.*

SIR: The first State budget is transmitted herewith.

The budget has not been hastily prepared. In one form or another it has been under consideration since July 1, 1917, when the Department of Finance assumed its duties. The final figures, containing the recommendations of this department, represent the work, not of this department alone, but represent the judgment of the heads of other departments under the Civil Administrative Code who have heartily cooperated in its formation. After the estimates were collected, they were consolidated and reviewed. Recommendations for expenditures have been made on the principle of their relative importance to the general administrative policies to be executed during the next biennium. Following that principle, requests for funds were subjected to a critical analysis and careful comparison. Heads of departments were called into conference. Divergent views were harmonized. The general needs of the State were discussed and particular requests were weighed in view of the general requirements. As a result, the plan herewith submitted will meet the needs of the State for the next two years, unless the State through legislation to be adopted at the present session expands its functions and in-

creases administrative duties. Of this subject more will be said hereafter. Subject to the qualifications above adverted to, the Department of Finance attests the soundness and economy of the program set forth in the accompanying papers. . . .

The preparation by the executive of a budget for submission to the Legislature is a new departure in this State. It is made possible only by reason of the progress this State has made, during the last two years, in financial administration.

The financial progress of this State may be summarized as follows:

- (1) The enactment of the Civil Administrative Code, unifying and consolidating over a hundred independent agencies, welding their detached operations into a logical and harmonious system, all of their financial operations being supervised through the Department of Finance;
- (2) The installation of a uniform system of bookkeeping, accounting and reporting for departments under the Code;
- (3) The establishment of ten standard appropriation accounts;
- (4) The institution of the departmental budget;
- (5) The requirement of monthly reports of disbursements and encumbrances for each department and division;
- (6) The establishment of a central purchasing agency;
- (7) The computation of unit costs;
- (8) The fixing of executive responsibility for expenditures through the approval of vouchers by the Finance Department;
- (9) Procuring, digesting and analyzing information concerning the financial needs of the State;
- (10) A weekly meeting of heads of departments for the consideration of questions of policy involving all the administrative departments and thus creating an esprit d'corps among administrative leaders;
- (11) The preparation of the first State budget.

By reason of these policies administrative functions have been discharged with energy and force and with a minimum expenditure of public funds. The theory underlying these principles is not only economy of administration, but of executive responsibility. This State has attained both ends.

The accomplishments of the last two years mark a distinct advance in financial administration. The program was a difficult one, but it has been worked out in its substantial features, at least. It is susceptible of further extension and development.

Prior to the enactment of the Code our laws contained few expedients to secure administrative responsibility. The Civil Administrative Code and policies instituted thereunder contain expedients by which executive



responsibility is enforced and appropriations made by the General Assembly protected from abuse or misuse. By the creation of a central purchasing agency, a uniform method, plan or policy of purchasing supplies has been instituted. The State can take advantage of the economic laws of supply and demand. It can buy at wholesale rather than at retail. It has secured the usual trade discounts. As a protection to the State for the disbursement of the hundreds of thousands of dollars by the State purchasing agency, we have the provision of the law that contracts "shall be let to the lowest responsible bidder."

All accounts and expenditures of the several departments are examined by the Department of Finance. Summary and controlling accounts are kept in the office of this department. No bill or voucher can be passed for payment without the approval of the Department of Finance, which has the power either to approve or to disapprove of vouchers. A monthly report showing the amounts which have been allotted and expended for each purpose in detail, analyzed by objects of expenditure, is submitted to and kept on file in the Department of Finance.

It is thus shown that the responsible executive authority is at all times in possession of accurate reports showing the results obtained in operating and maintaining the various State activities. The expenditure of public funds and their accounting is an open book accessible at all times to the public. It has been said that "the greatest power to enforce responsibility would be through the possibility of making the acts of officers public."

Through the devices contained in the Civil Administrative Code, any committee of the General Assembly, or any private citizen, wishing to know what is being done, what organization is provided for doing the work, what moneys are being expended, how they are being expended, how it is proposed that they shall be expended in the future by any department under the Civil Administrative Code, has this information accessible through accounts kept in the office of the Department of Finance.

The devices above referred to have secured both economy and vigor of administration. This department, however, is persuaded that three other devices must be resorted to if the financial operations of the State are to be placed upon a sound and substantial basis. Reference is made to lump sum appropriations, the standardization of employments, and biennial appropriations.

Our Constitution contains a clear differentiation between the functions of the legislative department and the executive department in the matter of appropriation and expenditure of the public funds. The Legislature "holds the purse strings." It determines all questions of policy which

involve the expenditure of money. It should determine the character of expenditure and should approve a general plan of work, development or policy. Furthermore it must designate the administrative agency or organization through which money shall be expended or work executed. Stated in another way, the General Assembly is responsible for determining policies involving the expenditure of money.

When the General Assembly shall have assented to the general policy of administration, such policy is committed to the executive department for execution. The executive department is responsible for the economy and efficiency with which the plans and policies of the General Assembly are carried out.

Sound principles of administration, as well as good business policy, dictate that executive officials should be made responsible for contracts and purchases made in the execution of legislative policy. They should be given power under which the largest possible returns are secured for a given expenditure of money, time and energy.

The differentiation between the respective functions of the General Assembly and of the executive Department has not always been observed in this State—especially in more recent years. The criticism is not peculiar to this State alone, but applies almost without exception to the other states. The legislative branch has not only assumed to settle questions of policy, but also through itemized appropriations containing great minuteness of detail, has deprived the administrative branch of the exercise of discretion and consequently has weakened administration. Itemization of appropriations has been the rule and not the exception. Flagrant examples of detailed segregation are those found in the appropriations made in 1917 to the several State executive offices and to the several departments under the Civil Administrative Code, wherein can be found hundreds of individual items fixing in detail the exact salary which must be paid to the several employees. Also, the Appropriation Acts of 1917 are full of details as to the character and amount to be expended by an officer of a department for repairs to specific buildings or equipment. The appropriations made to the several Normal schools fixed not only the position, but the salary, by individual items, of each employee from president and dean down to the gardener, janitor and yardman. Those made to the penal institutions were itemized to an extreme degree.

The argument against extreme itemization of appropriations may be summarized as follows:

(1) It deprives an administrative officer of the exercise of business judgment and discretion as to the execution of policies;

- (2) It creates administrative irresponsibility;
- (3) It creates waste and extravagance;
- (4) It interferes with any efficient or effective system of employment and organization of State employees;
- (5) It prevents the exercise of the ordinary principles of business prudence.

One writer on government states "The rigidity of the segregation of items of appropriation may be compared to *rigor mortis* which holds the departments and institutions of the State in a death-like grip."

Appropriations should be made upon standard principle. After an experience of eighteen months in the practical administration of thousands of detailed segregated items of appropriation, together with a relatively small number of lump sum appropriations, this department is of the opinion that the principle under which appropriations should be made for salaries and wages is that of a lump sum. Such appropriations can be safeguarded against abuse and wastefulness by legislative enactment.

The fixing of salaries of the thousands of State employees by arbitrary appropriation acts, susceptible of no legal elasticity, cripples accomplishment. During the past two years wages increased approximately 40 per cent. The State was placed in competition with the Federal Government, with corporations and with commercial and industrial concerns. Under such rigidity of appropriations, many employees who remained in the State service were penalized. The service suffered accordingly. No business enterprise could conduct its affairs successfully or profitably where the salary of each employee is fixed irrevocably for a period of two and one-half years in advance. In many instances this department has been able to greatly improve former conditions, notably in the charitable institutions through the cooperation and assistance of the Department of Public Welfare.

In the adjustment of salaries as shown by the budget, this department recommends a considerable increase in the salaries paid the employees of the State institutions. This service has been crippled for months because of the impossibility of filling vacant positions. For a number of years penal and charitable authorities have contended that the salaries appropriated did not attract those who were really qualified to have charge of the unfortunate wards of the State. Although the pressure for increased salaries in all of the State positions has been most extreme and insistent, increases recommended are in positions paying less than twelve hundred dollars per year, and in cases of some technical and educational positions where no increases have been granted for a number of years.

The department has found it necessary and important, often at the expense of valued and proficient employees, to gauge the salaries to be paid by the requirements of the position rather than by the capability of any individual employee. It is a truism that once the salary of a State position is fixed, it is never reduced and to adjust a salary for a person rather than for the position frequently would result in the State's being penalized later when, through the civil service, political or other change, the same position should be filled by a less proficient employee. This department deems it to be sound policy that the salary rates to be paid should be measured by the requirements of the position rather than by the abilities or attainments of the incumbent.

It is time to enter upon a constructive policy as to the standardization of State employments. Through civil service laws a policy, mostly negative and restrictive, has been worked out. No consistent policy, however, has been instituted to deal with the employment problem. There is no standardization. The condition found may be summarized as follows:

- (1) Fictitious, misleading and unnecessary titles are found;
- (2) No standard rates of pay for the same character of work prevail;
- (3) No systematic, just or equitable method of advancement and promotion is practiced;
- (4) Salaries, advancement and promotions are determined in a haphazard and irregular manner.

The civil service of the State should be placed on such a basis as to attract the ambitious. The State should be able to command the best brains and thought. Its service should be sought after by those who desire to advance and provision should be made by which the competent would be recognized and promoted. Such conditions do not prevail. However demonstrated the merit of an employee may be, under the present system he has little hope for preferment. Consequently he gets into a rut. This condition is bad for the individual, bad for the State, and bad for the service.

This department is of the opinion that a great advance would be made by standardizing employments and wages. In fact, standardization is essential if the best results are to be obtained from lump sum appropriations made for salaries and wages.

Some sound and substantial basis must be devised both to safeguard and protect the disbursements of enormous public funds as well as to insure a high degree of loyalty, efficiency, and fidelity in the public service.

This department recommends therefore that the General Assembly make some provision for an early standardization of public employment.

Previous General Assemblies have made a larger and larger percentage of its appropriations upon a per annum or a first year and second year basis. Arbitrary restrictions of this character have frequently made extremely difficult the economical use of funds. Conditions often prevail where for some excellent reason it may be unwise to expend appropriations within the first year, and yet contra it may be most advisable to be able to expend an additional amount during the second year. Where unusual market conditions prevail, a restriction of this nature results in a distinct loss.

Inasmuch as the Legislature only meets every two years, and must make appropriations for that period of time, we believe that good business judgment dictates that such appropriations should be made for the biennium rather than for the "first year" and the "second year."

While the Fiftieth General Assembly, in the main, continued the policy theretofore pursued of itemizing in detail many appropriations, yet it made a distinct advance in that, in appropriating to the several departments under the Civil Administrative Code, it made appropriations under such items as—

- "Salaries and wages;"
- "Departmental office expenses;"
- "Traveling expenses;"
- "Operating supplies and expenses;"
- "Industrial working capital;"
- "School supplies;"
- "Repairs;"
- "Equipment;"
- "Building;" and
- "Land."

Acting under the power to prescribe standard accounts, the Department of Finance established in its office ten standard accounts, with appropriate sub-divisions under each account, in conformity with the above items of appropriations and kept its account of public expenditures by the several departments accordingly, even though, in many instances, the appropriation was an itemized one not falling within one of the above items. The experience of practical operation has demonstrated that with slight modification all of the appropriations for the ordinary and contingent expenses of the State Government are susceptible of being made in a limited number of items. The objects and purposes for which



appropriations are made could be classified and standardized by items as follows:

- (1) Salaries and wages;
- (2) Office expenses;
- (3) Traveling expenses;
- (4) Operating supplies and expenses;
- (5) Industrial working capital;
- (6) Repairs and replacements;
- (7) Equipment;
- (8) Buildings, permanent improvements and betterments;
- (9) Land;
- (10) Fixed charges and contributions;
- (11) Contingencies;
- (12) Deficiencies and emergencies.

This department is of the opinion that after the General Assembly has considered the budget herewith submitted and has ascertained the amount necessary for expenditure by each officer, department or institution for each of the above purposes, it would conduce not only to energy and vigor of administration, but to economy of government, should the appropriations be made by items as above set forth.

Further than that, the number of appropriation acts is capable of great reduction from the number heretofore passed. In short, all of the appropriations for all officers, institutions and departments of the State Government, including the National Guard and Naval Reserve, are capable of being placed in a single act. In outlining the general form of the act, the General Assembly could proceed by organization units. Under each organization unit the appropriation can be made by objects, following the standard items above set forth.

The number of appropriation acts therefore could be reduced to the following:

- (1) General Appropriation Act;
- (2) Officers' Salary Act;
- (3) Deficiency Acts;
- (4) Private Relief Acts;
- (5) Special Appropriations.

Former appropriations have usually included large lump sums for contingent purposes and for various emergency needs. This method has made it necessary to include for each activity of the State a sum designed to cover possibilities unforeseen, and amounts the necessity for



which are more or less problematical. It is obvious that appropriations made in this way have caused extravagance and unnecessary expenditure. The budget transmitted herewith includes a recommendation for an appropriation of two hundred fifty thousand dollars per annum to the Department of Finance, specific amounts thereof to be assigned to the various Code Departments and to the Adjutant General in the Appropriation Act. Any disbursement of funds therein appropriated to be made only upon a proper showing in writing as to existing demand or emergency, and subject to the approval of the Governor. Further authority should be given by which the Department of Finance could transfer funds from one department to the other as necessity demanded. It is evident that "peak loads" will not develop in all of the departments and divisions and such a plan therefore makes unnecessary large appropriations to each department for each such purpose.

The financial program as set forth in the budget presents a unified program and will meet the needs of the administration for the next two years, unless, as above stated, the State expands its functions or casts more work upon the departments. It is impossible to forecast what special appropriations may be made necessary by reason of the revision of our statutes involving administration, or by reason of new policies instituted by the General Assembly itself. If radical changes are made in laws involving administration through executive authorities, then the figures submitted would necessarily have to be revised to conform to the changed situation.

This department is convinced that legislation, in addition to that contained in the Civil Administrative Code, and supplemental thereto, is necessary to put the financial operation of the State on a sound business basis. A Finance Code should, in the judgment of the department, be enacted to embody the following principles:

- (1) A change of the commencement of the fiscal year from the first day of October to the first day of July;
- (2) A provision for departmental allotment of funds before an appropriation becomes available for expenditure;
- (3) The establishment of an industrial working capital fund for State penal institutions;
- (4) Uniformity in the form, approval and certification of vouchers for disbursing funds under appropriations;
- (5) Uniformity with reference to the period of availability and lapse of appropriations;
- (6) Definitions of the several standard items of appropriation;
- (7) General conditions attached to appropriations;

(8) Restrictions on purchases in excess of a given amount without plans and specifications and without advertisements for bids.

The principles suggested for a Finance Code are in harmony with general business practices. By their adoption, safeguards in the interest of the people will be thrown around the expenditure of public funds, while at the same time energy of administration will be promoted. Moreover, by the adoption of a Code containing such principles, each Appropriation Act would be made with reference thereto and would not carry, as Appropriation Acts do now, detailed restrictions. Such a code is in the interest of good administration.

Expedients of this kind would remove the incentive and the last lingering reason for detailed itemization of appropriations. Moreover, they would conduce to more efficient administration and better government.

The first State Budget is submitted with some temerity. In its preparation, while drawing freely on the limited experience of other states, the department was without precedent to guide. It is believed, however, that, with the facts and information collected, digested and analyzed by the department during the last two years, the appropriations at this session can be made more intelligently and with greater economy.

Respectfully submitted,

OMAR H. WRIGHT, *Director of Finance.*

WILLIAM H. McLAIN, *Supt. of Budget.*

## CHAPTER XXVI

### ECONOMIC AND SOCIAL PROBLEMS

#### 146. THE STATE POLICE POWER

The growing complexities of modern life require continually greater governmental regulation. Many regulations are made by the states or municipalities in the exercise of the police power for the promotion of the health, safety, morals and general welfare of the people. In the case of *Barbier v. Connolly*, decided by the Supreme Court of the United States in 1885, Justice Field, speaking for the court in upholding an ordinance of San Francisco prohibiting the operation of public laundries at night, made a classic statement of the scope of the state police power. In 1905 the court, by a divided vote, held that the state police power did not extend to the prohibition of the employment of any person in bakeries for more than ten hours a day. Among other justices who dissented in this case was Justice Holmes, whose dissenting opinion the court has virtually adopted in principle in later cases. In 1927 the same court, by a five-to-four decision, held invalid as violative of the Fourteenth Amendment a New York law which declared the charge for admission to theatres a matter affected with a public interest and forbade the resale of tickets of admission at a price in excess of fifty cents more than the price printed on the face of the ticket. The court held that the act could not be sustained as a valid exercise of the police power of the state. Mr. Justice Holmes, in his dissenting opinion, suggested the abandonment of the police power doctrine.

##### a. Scope of the Police Power

[*Barbier v. Connolly* (1885), 113 U. S. 27, 31-32; 28 L. Ed. 923, 924-925.]

Mr. Justice Field delivered the opinion of the Court: . . .

The 14th Amendment, in declaring that no State "shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty or arbitrary spoliation of property but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pur-

suits by others under like circumstances ; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses. But neither the Amendment, broad and comprehensive as it is, nor any other amendment was designed to interfere with the power of the state, sometimes termed its "police power," to prescribe regulations to promote the health, peace, morals, education and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity. From the very necessities of society, legislation of a special character, having these objects in view, must often be had in certain districts, such as for draining marshes and irrigating arid plains. Special burdens are often necessary for general benefits, for supplying water, preventing fires, lighting districts, cleaning streets, opening parks, and many other objects. Regulations for these purposes may press with more or less weight upon one than upon another, but they are designed, not to impose unequal or unnecessary restrictions upon anyone, but to promote, with as little individual inconvenience as possible, the general good. Though, in many respects, necessarily special in their character, they do not furnish just ground of complaint if they operate alike upon all persons and property under the same circumstances and conditions. Class legislation, discriminating against some and favoring others, is prohibited ; but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated, is not within the Amendment.

#### **b. Police Power and Individual Liberty**

[*Lochner v. New York* (1905), 198 U. S. 45, 75-76; 49 L. Ed. 937, 949.]

Mr. Justice Holmes, dissenting :

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious or if you like as tyrannical as this, and which equally with this interfere with the liberty to contract. Sunday laws and usury laws

are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the postoffice, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not.

The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U. S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States*, 193 U. S. 197. Two years ago we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker*, 187 U. S. 606. The decision sustaining an eight-hour law for miners is still recent. *Holden v. Hardy*, 169 U. S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word "liberty" in the Fourteenth Amendment is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first instalment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss.



### c. Proposal to Abandon the Police Power Doctrine

[*Tyson v. Banton* (1927), 273 U. S. 418, 445-447.]

Mr. Justice Holmes, dissenting:

We fear to grant power and are unwilling to recognize it when it exists. The states very generally have stripped jury trials of one of their most important characteristics by forbidding the judges to advise the jury upon the facts (*Graham v. United States*, 231 U. S. 474, 480, 58 L. ed. 319, 342, 34 Sup. Ct. Rep. 148), and when legislatures are held to be authorized to do anything considerably affecting public welfare it is covered by apologetic phrases like the police power, or the statement that the business concerned has been dedicated to a public use. The former expression is convenient, to be sure, to conciliate the mind to something that needs explanation; the fact that the constitutional requirement of compensation when property is taken cannot be pressed to its grammatical extreme; that property rights may be taken for public purposes without pay if you do not take too much; that some play must be allowed to the joints if the machine is to work. But police power often is used in a wide sense to cover and, as I said, to apologize for the general power of the legislature to make a part of the community uncomfortable by a change.

I do not believe in such apologies. I think the proper course is to recognize that a state legislature can do whatever it sees fit to do unless it is restrained by some express prohibition in the Constitution of the United States or of the state, and that courts should be careful not to extend such prohibitions beyond their obvious meaning by reading into them conceptions of public policy that the particular court may happen to entertain. Coming down to the case before us I think, as I intimated in *Adkins v. Children's Hospital*, 261 U. S. 525, 569, 67 L. ed. 785, 801, 24 A. L. R. 1238, 43 Sup. Ct. Rep. 349, that the notion that a business is clothed with a public interest and has been devoted to the public use is little more than a fiction intended to beautify what is disagreeable to the sufferers. The truth seems to me to be that, subject to compensation when compensation is due, the legislature may forbid or restrict any business when it has a sufficient force of public opinion behind it. Lotteries were thought useful adjuncts of the state a century or so ago; now they are believed to be immoral and they have been stopped. Wine has been thought good for man from the time of the Apostles until recent years. But when public opinion changed it did not need the 18th Amendment, notwithstanding the 14th, to enable a state to say that the business should end. *Mugler v. Kansas*, 123 U. S. 623, 31 L. ed. 205, 8 Sup. Ct. Rep.



273. What has happened to lotteries and wine might happen to theaters in some moral storm of the future, not because theaters were devoted to a public use, but because people had come to think that way.

But if we are to yield to fashionable conventions, it seems to me that theaters are as much devoted to public use as anything well can be. We have not that respect for art that is one of the glories of France. But to many people the superfluous is the necessary, and it seems to me that government does not go beyond its sphere in attempting to make life livable for them. I am far from saying that I think this particular law a wise and rational provision. That is not my affair. But if the people of the state of New York speaking by their authorized voice say that they want it, I see nothing in the Constitution of the United States to prevent their having their will.

Mr. Justice Brandeis concurs in this opinion.

#### 147. THE PROBLEM OF SOCIAL SECURITY

Various forms of economic insecurity in the United States, such as unemployment and dependency in old age, became accentuated following the collapse of 1929. One of the purposes of the "New Deal" Administration of Franklin Roosevelt was to provide greater security against such hazards through governmental action. The execution of this plan required cooperation between the Federal Government and the states in both legislation and administration. In the following extract are discussed some phases of Federal-state relations in carrying out the social security program embodied in the Congressional Act of 1935.

[Joseph P. Harris, "The Social Security Program of the United States," *American Political Science Review*, vol. 30, pp. 455-493 (June, 1936).]

. . . The Social Security Act provides federal aid to the states for welfare and health purposes, the largest of which by far is that for old-age assistance. The adoption of a policy of federal aid for welfare purposes raises the question as to whether it is necessary for the federal government to assume some responsibility for these activities, whether the state and local units of government are able to carry them on adequately without federal assistance, and whether the historic policy of this country of making the care of dependent members of society exclusively a local and state responsibility should be retained. . . .

It is quite obvious that if old-age assistance can be developed upon an adequate scale in this country, it cannot be placed upon general property taxation, but must be financed largely by the state and federal governments through other forms of taxation. The financial condition of the states is little better than that of the local units of government.

While they legally have the power to levy new kinds of taxes, except where strict constitutional provisions or unfavorable decisions of the Supreme Court limit this power, actually the state is too small an economic unit to levy effective taxes. This is well indicated by the history of state financing of unemployment relief. Many states have resorted to borrowing or to the sales tax.<sup>1</sup> Very few states have developed a satisfactory tax program to meet increased governmental cost. Aside from the inherent tax limitations of state and local governments, many states are economically too poor to provide adequate old-age assistance or other forms of public welfare without federal aid. Studies of per capita wealth and incomes indicate an extremely wide variation among states. The average per capita income of all inhabitants of a state varied in 1929 from a maximum in New York of \$1,365, and an average income in the Middle Atlantic states of \$1,093, to an average per capita income of \$261 in South Carolina and \$287 in Mississippi.<sup>2</sup> Other striking comparisons could be made of the tremendous difference in wealth and income between the wealthier states and the poorer ones. These comparisons seem to call for a wider use of grants-in-aid for welfare purposes. Any program for an increase in old-age assistance, aid to dependent children, and other welfare activities necessarily requires federal aid. It may be anticipated that in this country, as abroad, the national government will assume a larger responsibility in the field of welfare activities in the future. Along with this financial responsibility should go adequate provisions to insure that federal aid to the states and local units of government is expended wisely.

#### ADMINISTRATIVE PROBLEMS

This country has had little or no experience with the administration of compulsory forms of social insurance. Only one state had unemployment compensation prior to 1935, and in that state benefits have not yet become payable. There has been no experience with compulsory old-age insurance, and very little experience with free old-age pensions. The Social Security Act creates the largest system of old-age insurance yet attempted in any country, covering twice as many persons as the English system, and involving several times as much money. Similarly, unemployment compensation, if adopted by substantially all of the states, will apply to more employees and involve larger sums of money than any system abroad. These huge insurance enterprises, as well as

<sup>1</sup> See Llaslo Ecker-R, "Revenues for Relief," *State Government*, Nov., 1934.

<sup>2</sup> See Levin, Moulton, and Warburton, *America's Capacity to Consume* (Washington, 1934), *passim*.

the administration of old-age assistance, present difficult administrative problems. Employers are not accustomed to making the necessary reports and will doubtless raise serious objections to the requirements of pay-roll reports and other information. The problems of records, coverage, collection of contributions, the handling of claims, and the payment of benefits, will be very great in social insurance schemes affecting twenty to thirty million workers. A large organization to handle these and related matters will be required.

The state unemployment compensation laws will be administered by the several states, but under some federal supervision. Only nine states have civil service laws, and only a few (not in all cases those with civil service laws) have reasonably satisfactory personnel traditions. No other country in the world has ever attempted to set up a large social insurance undertaking under the administration of politically-appointed and non-permanent personnel. The administration of state workmen's compensation laws is not reassuring. In state plans with a pooled fund, the absence of any contesting party to claims for benefits may result in grave abuses. The original Social Security Act provided that the personnel administering unemployment insurance should be selected upon a non-partisan, merit basis, and the federal agency had authority to require minimum personnel standards. These provisions were stricken from the bill, and there is now no direct federal supervision over personnel provided in the act. Whether greater federal supervision would insure better administration is, of course, debatable. We have not developed in this country a satisfactory system of public employment offices, which is generally regarded as an essential feature of an unemployment compensation system, though progress in this direction has been made under the Wagner-Peyser Act.

The prospect for satisfactory administration of old-age assistance and the other welfare activities is not particularly good. Very few states have developed unified state and local departments of public welfare, adequately equipped and organized to administer these activities. Already the administration of old-age assistance in several states has been criticized severely because of the lack of competent, trained investigators and the domination of the systems by political appointees, resulting in the placing of unqualified persons on the old-age pension rolls. Under the federal act, the Social Security Board is not authorized to require any minimum standards of personnel qualifications, and because of the recent furore over centralization and states' rights, will probably regard it as unwise to withhold federal aid, except as a last resort. It seems

inevitable that as time goes on grave abuses in particular states will force Congress to strengthen the law.

Some of these difficulties are inevitable in setting up systems of social insurance; others arise out of the generally low standards of public administration prevailing in many state and local governments. Many advocates of social security favor national administration. But the nationalization of all of these services, even if legally and politically possible, would give rise to other administrative difficulties equally serious. National administration may come in time, particularly if incompetent and political state administration obtains. Experience in other joint activities between the states and the federal government, such as highways, agriculture, public health, and agricultural extension service, indicates that it is possible to develop satisfactory standards of administration. In fact, it is generally in these activities that the best standards of state administration are to be found. The existence of federal agencies charged with rendering technical services to the state administrative agencies, with carrying on research studies and actuarial investigations, and with some supervisory authority, will help to bring about satisfactory standards of administration. The future of social security in this country will depend largely upon its administration. Incompetent, political, or slipshod administration by the states may lead either to curtailment of the program or to federal administration.

#### 148. MINIMUM WAGE LEGISLATION

A problem with which a number of the states have considered themselves to be confronted is that of legally restraining employers from paying employees, especially women and children, an unreasonably low wage. Such a wage is sometimes defined as one which does not return a fair value for the services rendered and is not high enough to enable the employee to maintain a minimum standard of living. In attempting to reach this objective, the states have been hindered by the conservative attitude of the courts in interpreting the due process of law clauses of the constitutions as preventing any restriction on the freedom of employees in contracting to work for any wages they please. The leading case taking this view was *Adkins v. Children's Hospital*, decided by the Supreme Court in 1923 with reference to women and children employed in the District of Columbia. On the strength of this decision, several state minimum wage laws were also held invalid. As late as 1936 the position taken in the *Adkins* case was adhered to by the Supreme Court in *Morehead v. New York ex rel. Tipaldo*, invalidating a New York minimum wage statute. This, however, was a five-to-four decision. It aroused widespread criticism of the Court as an assumption of legislative power by the judiciary. Whether or not as a result of this criticism, when, in the following year, the minimum wage statute of the state of Washington came before the Court,



Justice Roberts changed his position, with the result that the statute was sustained by a five-to-four vote and the Adkins case was expressly overruled.

[*West Coast Hotel Co. v. Parrish* (1937), 300 U. S. 379.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This case presents the question of the constitutional validity of the minimum wage law of the State of Washington.

The Act, entitled "Minimum Wages for Women," authorizes the fixing of minimum wages for women and minors. Laws of 1913 (Washington) chap. 174; Remington's Rev. Stat. (1932), §§ 7623 et seq. It provides:

"SECTION 1. The welfare of the State of Washington demands that women and minors be protected from conditions of labor which have a pernicious effect on their health and morals. The State of Washington, therefore, exercising herein its police and sovereign power declares that inadequate wages and unsanitary conditions of labor exert such pernicious effect.

"SEC. 2. It shall be unlawful to employ women or minors in any industry or occupation within the State of Washington under conditions of labor detrimental to their health or morals; and it shall be unlawful to employ women workers in any industry within the State of Washington at wages which are not adequate for their maintenance.

"SEC. 3. There is hereby created a commission to be known as the 'Industrial Welfare Commission' for the State of Washington, to establish such standards of wages and conditions of labor for women and minors employed within the State of Washington, as shall be held hereunder to be reasonable and not detrimental to health and morals, and which shall be sufficient for the decent maintenance of women."

The appellant conducts a hotel. The appellee Elsie Parrish was employed as a chambermaid and (with her husband) brought this suit to recover the difference between the wages paid her and the minimum wage fixed pursuant to the state law. The minimum wage was \$14.50 per week of 48 hours. The appellant challenged the act as repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States. The Supreme Court of the State, reversing the trial court, sustained the statute and directed judgment for the plaintiffs. *Parrish v. West Coast Hotel Co.* 185 Wash. 581, 55 P. (2d) 1083. The case is here on appeal.

The principle which must control our decision is not in doubt. The constitutional provision invoked is the due process clause of the Fourteenth Amendment governing the States, as the due process clause in-

voked in the Adkins Case governed Congress. In each case the violation alleged by those attacking minimum wage regulation for women is deprivation of freedom of contract. What is this freedom? The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due process of law. In prohibiting that deprivation the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people. Liberty under the Constitution is thus necessarily subject to the restraints of due process, and regulation which is reasonable in relation to its subject and is adopted in the interests of the community is due process.

It is manifest that this established principle is peculiarly applicable in relation to the employment of women in whose protection the State has a special interest. That phase of the subject received elaborate consideration in *Muller v. Oregon* (1908) 208 U. S. 412, 52 L. ed. 551, 28 S. Ct. 324, 13 Ann. Cas. 957, where the constitutional authority of the State to limit the working hours of women was sustained. We emphasized the consideration that "woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence" and that her physical well being "becomes an object of public interest and care in order to preserve the strength and vigor of the race." We emphasized the need of protecting women against oppression despite her possession of contractual rights. We said that "though limitations upon personal and contractual rights may be removed by legislation, there is that in her disposition and habits of life which will operate against a full assertion of those rights. She will still be where some legislation to protect her seems necessary to secure a real equality of right." Hence she was "properly placed in a class by herself, and legislation designed for her protection may be sustained even when like legislation is not necessary for men and could not be sustained." We concluded that the limitations which the statute there in question "placed upon her contractual powers, upon her right to agree with her employer as to the time she shall labor" were "not imposed solely for her benefit, but also largely for the benefit of all."

The minimum wage to be paid under the Washington statute is fixed after full consideration by representatives of employers, employees and the public. It may be assumed that the minimum wage is fixed in consideration of the services that are performed in the particular occupations under normal conditions. Provision is made for special licenses at



less wages in the case of women who are incapable of full service. The statement of Mr. Justice Holmes in the *Adkins Case* is pertinent: "This statute does not compel anybody to pay anything. It simply forbids employment at rates below those fixed as the minimum requirement of health and right living. It is safe to assume that women will not be employed at even the lowest wages allowed unless they earn them, or unless the employer's business can sustain the burden. In short the law in its character and operation is like hundreds of so-called police laws that have been upheld." 261 U. S., p. 570. And Chief Justice Taft forcibly pointed out the consideration which is basic in a statute of this character: "Legislatures which adopt a requirement of maximum hours or minimum wages may be presumed to believe that when sweating employers are prevented from paying unduly low wages by positive law they will continue their business, abating that part of their profits, which were wrung from the necessities of their employees, and will concede the better terms required by the law; and that while in individual cases hardship may result, the restriction will enure to the benefit of the general class of employees in whose interest the law is passed and so to that of the community at large." *Id.* p. 563.

We think that the views thus expressed are sound and that the decision in the *Adkins Case* was a departure from the true application of the principles governing the regulation by the State of the relation of employer and employed. Those principles have been reenforced by our subsequent decisions. Thus in *Radice v. New York*, 264 U. S. 292, 68 L. ed. 690, 44 S. Ct. 325, we sustained the New York statute which restricted the employment of women in restaurants at night. In *O'Gorman & Young v. Hartford F. Ins. Co.* 282 U. S. 251, 75 L. ed. 324, 51 S. Ct. 130, 72 A.L.R. 1163, which upheld an act regulating the commissions of insurance agents, we pointed to the presumption of the constitutionality of a statute dealing with a subject within the scope of the police power and to the absence of any factual foundation of record for deciding that the limits of power had been transcended. In *Nebbia v. New York*, 291 U. S. 502, 78 L. ed. 940, 54 S. Ct. 505, 89 A.L.R. 1469, dealing with the New York statute providing for minimum prices for milk, the general subject of the regulation of the use of private property and of the making of private contracts received an exhaustive examination and we again declared that if such laws "have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied;" that "with the wisdom of the policy adopted, with the adequacy or practicability of the law enacted to forward it, the courts are both incompetent and un-

authorized to deal;" that "times without number we have said that the legislature is primarily the judge of the necessity of such an enactment, that every possible presumption is in favor of its validity, and that though the court may hold views inconsistent with the wisdom of the law, it may not be annulled unless palpably in excess of legislative power." *Id.* pp. 537, 538.

With full recognition of the earnestness and vigor which characterize the prevailing opinion in the *Adkins Case*, we find it impossible to reconcile that ruling with these well-considered declarations. What can be closer to the public interest than the health of women and their protection from unscrupulous and overreaching employers? And if the protection of women is a legitimate end of the exercise of state power, how can it be said that the requirement of the payment of a minimum wage fairly fixed in order to meet the very necessities of existence is not an admissible means to that end? The legislature of the State was clearly entitled to consider the situation of women in employment, the fact that they are in the class receiving the least pay, that their bargaining power is relatively weak, and that they are the ready victims of those who would take advantage of their necessitous circumstances. The legislature was entitled to adopt measures to reduce the evils of the "sweating system," the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living thus making their very helplessness the occasion of a most injurious competition. The legislature had the right to consider that its minimum wage requirements would be an important aid in carrying out its policy of protection. The adoption of similar requirements by many States evidences a deepseated conviction both as to the presence of the evil and as to the means adapted to check it. Legislative response to that conviction cannot be regarded as arbitrary or capricious and that is all we have to decide. Even if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.

There is an additional and compelling consideration which recent economic experience has brought into a strong light. The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of

economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. While in the instant case no factual brief has been presented, there is no reason to doubt that the State of Washington has encountered the same social problem that is present elsewhere. The community is not bound to provide what is in effect a subsidy for unconscionable employers. The community may direct its law-making power to correct the abuse which springs from their selfish disregard of the public interest. The argument that the legislation in question constitutes an arbitrary discrimination, because it does not extend to men, is unavailing. This Court has frequently held that the legislative authority, acting within its proper field, is not bound to extend its regulation to all cases which it might possibly reach. The legislature "is free to recognize degrees of harm and it may confine its restrictions to those classes of cases where the need is deemed to be clearest."

## INDEX

- Ableman v. Booth, 64-69
- Accounting methods, national, 355, 356, 357, 359, 555-570; state, 824-827, 829-830, 834-835
- Adams, John, and declaration of independence, 23; Vice President, as member of Cabinet, 299, 300, 327; President, midnight appointments by, 490
- Adkins v. Children's Hospital, 502, 845-850
- Administration, national, relations of President to, 258-267, 335-338; congressional investigations of, 338-343; administrative commissions in, 343-351, 355-356, 359; reorganization of, 352-375; state, reorganization of, 765-784
- Administration measures, in Congress, 387-391; in state legislatures, 756-758
- Administrative Management, President's Committee on, reports, 291-293, 346-357, 396-406, 561-570
- Admission, of Canada, 33-34; of states, 91-95, 246-248, 422
- Aggression, policy with respect to, 615-618
- Agriculture, department of, 372, 373, 374
- Aikin, Charles, on selection of judges in California, 793
- Albany Plan, 4, 8-11
- Alexandria Convention, 35
- Amendment, of U. S. Constitution, 48-60; of state constitutions, 671-693
- American Legislators' Association, 122
- American Tobacco Company case, 574-577
- Annapolis Convention, 35-38
- Anti-Masonic party, national convention of, 226
- Anti-trust act, 267, 574
- Apportionment, of Congress, 421-429; of state legislatures, 701
- Arbitration courts, 805-806
- Arizona, recall in, 199-200; admission of, 422
- Armed Merchant Ship bill, filibuster against, 455, 457
- Arms embargo, power of President with respect to, 611-614
- Arthur, Chester A., Vice President, and presidential succession, 210
- Articles of Confederation, 27-34, 35, 38, 199, 628
- Association, Continental, 16, 19-23
- Attorney General, nomination of C. B. Warren as, 300-315; opinion on right of members of Congress to hold other public office, 414-417
- Auditor General, recommendation of President's Committee with respect to, 569-570
- Bailey v. Drexel Furniture Co., 550-552
- Ballot, prohibition repeal, 58; primary, 167; elections, 177; initiative and referendum, 195; presidential, 217-225; short, 771, 780, 790
- Bank, Second United States, constitutionality of, 69-74; removal of deposits from, 335-338; Export-Import, 374
- Bar Association, of Cleveland, proposal with respect to selection of judges, 788-791
- Barbier v. Connolly, 838-839
- Barron v. Baltimore, 77-80
- Berdahl, Clarence A., on the Richards primary, 164-167
- Berger, Victor, refused seat in House of Representatives, 407
- Bicameral system, in state legislatures, 694-700, 758
- Bill of rights, federal, proposed by states, 44-48; application to states, 77-91; application to insular possessions, 634-643
- Borah, William E., Senator, resolution with respect to senatorial courtesy, 257-258; on confirmation of Cabinet appointments, 310-313; on removal of Cabinet officers, 317-320; proposal with respect to judicial review, 505
- Boss, party, 134, 136-137
- Boulder Dam Compact, 108-111

- Briand-Kellogg Pact, for outlawry of war, 594, 617, 626-627
- Brown, Henry B., Justice, on constitutionality of income tax, 501; on doctrine of incorporated and unincorporated territory, 634-636
- Bruce, A. A., on position of the judge, 785-788
- Bryan, William Jennings, on war referendum, 195; on Vice President as member of Cabinet, 328-329
- Budget and Accounting Act, 552-557
- Budget system, national, 278, 293, 294-295, 297, 368, 552; in states, 746, 749-756, 758, 769-771, 775-778, 818-837
- Buenos Aires Convention, with respect to Monroe Doctrine, 586, 591
- Bureau of Public Roads, 372, 373
- Burton, Theodore E., Representative, appointment to World War Foreign Debt Commission, 413-421
- Butler, Pierce, Justice, on taxation of governmental instrumentalities, 534; on doctrine of direct and indirect interference, 582-583
- Cabinet, and presidential succession, 210-211; origin of, 299-300; appointment of, 300-315; removal of, 315-327; Vice President as member of, 327-331; seats in Congress for, 331-334; in states, 771-774, 777, 778
- Cabinet system, 331
- California, and Japanese question, 95-100; split session in, 702-704; selection of judges in, 793
- Campaign funds, 145-154, 407, 411
- Canada, admission of, 33-34
- Cannon, Joseph G., Speaker, on powers of Speaker, 437-442
- Capper, Arthur, Senator, proposal with respect to District of Columbia, 646-649
- Cash and carry, provisions of Neutrality Act, 594-595, 600-603
- Caucus, in Congress, 433-437, 442, 443
- Census, and congressional reapportionment, 422, 423, 424-426
- Central Statistical Board, 368
- Child labor cases, 546-547, 550-552, 579-582
- China, policy with respect to, 591, 593-594, 614-616
- Circuit Courts of Appeals, 484-487, 507-508, 515-518
- Citizenship, definition of, 74-77
- Civil Administrative Code, of Illinois, 746, 824-837
- Civil Rights Act, 173
- Civil service, establishment of, 376-383; extension of, 383-388; working of, 388-406; proposals with respect to, 293, 294, 296, 355, 359, 369
- Civilian Conservation Corps, 370, 372
- Clark, Champ, Representative, on powers of Speaker, 438-439
- Clark, J. Reuben, Undersecretary of State, memorandum with respect to Monroe Doctrine, 586, 590
- Classification Act, 376, 380-383
- Cleveland, city of, proposal of bar association with respect to selection of judges, 788-791; recommendations of Survey of Criminal Justice with respect to same, 791-792
- Cleveland, Grover, President, and merit system, 383
- Cloture, in Senate, 457, 458-459
- Coker, F. W., on administrative reorganization, 778-781
- Colorado River Compact, 108-111
- Commerce, interstate, scope of power over, 571-574; rule of reason with respect to, 574-577; relation to intrastate commerce, 577-578; relation to police power, 578-584
- Commerce Court, act abolishing, 488
- Commission on Interstate Cooperation, 118, 122-125
- Committee on committees, 437, 442, 443-447
- Committee of correspondence, 13-16
- Committee of the states, 32, 33
- Committee system, in Congress, 437-438, 442-454; in state legislatures, 706-710
- Commodity Credit Corporation, 374
- Compacts, interstate, 104-119
- Comptroller General, 278-279, 355, 356, 357, 359, 555-570
- Conciliation courts, 800-804
- Conference committee, 447-454
- Confirmation, power of, 300-313
- Conflicting taxation, 535-546
- Congress, power with respect to admission, 91; recall of, 199, 200-204; power over elections, 173; seats for Cabinet in, 331-334; investigations by, 338-343; and administrative reorganization, 352, 358-365; extension of



- merit system by, 383-384; power to seat members, 407-413; right of members to hold other public office, 413-421; reapportionment of, 421-429; right to instruct members of, 429-432; party caucus in, 433-437, 443-447; revolution in, 437-442; committee system in, 442-454; filibuster in, 455-457; debate rules in, 457-462; expert assistance to, 462-479; amount of legislation by, 479-483; power over courts, 484-488, 504; power over commerce, 571-584; power with respect to foreign relations, 594-595, 611-614; power over territorial possessions, 634-643, 650; power over District of Columbia, 643-649
- Congressional Caucus, 226
- Connecticut, suffrage qualifications in, 171-172
- Constitution, national, plans for, 38-44; ratification of, 44-48; amendment of, 48-60; state, amendment and revision of, 181-182, 194-195, 671-693; model, 758; of Philippines, 662-667
- Constitutional convention, national, 35, 38-44, 48-51; state, 671-693
- Continental Association, 16, 19-23
- Continental Congress, 16-23
- Continentalization, with respect to Monroe Doctrine, 586, 590-591
- Convention, party, national, call for, 226-232; selection of, 232-235; conduct of, 235-245
- Coolidge, Calvin, Vice President, as member of Cabinet, 327; President, on the party system, 134; and third term, 207; executive order with respect to the foreign service, 272-274; Cabinet appointments by, 300-327; protest against Senate investigation, 340-341; and Tariff Commission, 344-346; and extension of merit system, 383; on Philippine independence, 650
- Correspondence, committee of, 13-16
- Corrupt practices, federal acts with respect to, 145-146, 149-156
- Coulee Dam case, and taxation of governmental instrumentalities, 519
- Council of Personnel Administration, 387-388
- Council of State Governments, 122-127
- Couzens, James, Senator, bill for Cabinet seats in Congress, 334
- Crime, control of, 117-122
- Criminal procedure, reform of, 794-797
- Culbertson, William F., on control of Tariff Commission, 344-346
- Cummins, Albert C., Senator, on confirmation of Cabinet appointments, 304-309
- Cumulative voting, in Illinois, 702
- Curtis, Charles, Vice President, as member of Cabinet, 327
- Curtiss-Wright Export Corporation case, 611-614
- Daugherty, H. M., Attorney General, opinion on appointment of members of Congress to public office, 414-417
- Dawes, Charles G., Vice President, and casting vote, 300; as member of Cabinet, 330-331
- Day, William R., Justice, on referendum on constitutional amendments, 59-60; on federal regulation of child labor, 579-580; on doctrine of formal and fundamental constitutional provisions, 638-643
- Debate, rules of, in Congress, 457-462
- Declaration of Independence, 23-27
- Delegation of power, with respect to arms embargo, 611-614
- Democratic party, national committee of, 159-160; national convention of, 231, 239-243; instructions to members of Congress, 432; House caucus of, 433-435
- Demonstrations, in national conventions, 238-243
- Denby, Edwin, Secretary of the Navy, and oil leases, 269-270; removal of, 315-327
- Dickinson, John, and declaration of independence, 23; and articles of confederation, 27
- Direct and indirect interference, doctrine of, 579, 582-584
- Disability, presidential, 211-217
- District of Columbia, government of, 643-649; minimum wage legislation in, 845-846
- District system, for election of Representatives in Congress, 422, 426-429
- Dorr v. United States, 634, 638-643
- Dorr's Rebellion, 61
- Downes v. Bidwell, 634-638
- Draftsmanship, in respect to initiative and referendum, 188-189
- Dred Scott case, 74-75, 634



- Dunne, E. F., Governor, call for special session in Illinois, 747-749
- Dyestuffs embargo, conference committee action with respect to, 452-454
- Economic problems, of states, 838-850
- Economy Act, 352
- Education, office of, 370, 371
- Elastic clause, 69
- Elections, federal law concerning, 173-177; ballots in, 177; voting machines in, 177
- Electors, presidential, 217-225
- Electric Home and Farm Authority, 374
- Embargo, on arms, power of President with respect to, 611-614
- Emergency measures, and initiative and referendum, 178, 183-184, 185, 192-193
- Employment service, national, 370
- Enabling act, 91-95
- Enforcement of law, 267-270
- Europe, policy with respect to, 585-586
- Evans, Lawrence B., on constitutional convention in Massachusetts, 685-693
- Executive agreements, 591-594
- Executive Office, of President, 291-298, 368-369
- Executive orders, 272-274, 293-298, 352, 383, 385-388
- Expenditures, party campaign, 145-154, 407, 411; state, trend of, 815-818
- Expert assistance, to Congress, 462-479; to state legislatures, 719-725, 735, 738-739, 742-743
- Export-Import Bank, 374
- Extradition, 102-103, 118-119
- Fall, Albert B., Senator, on inability of President Wilson, 214-215; Secretary of the Interior, and oil leases, 269-270, 315-316
- Far East, policy with respect to, 591, 593-594, 614-616
- Farewell Address, of President Washington, 131-133, 207-208, 585-586
- Farley, James A., Chairman of Democratic National Committee, 231
- Farm Credit Administration, 374
- Faust, Martin L., on custody of state funds, 812-815
- Federal aid, 373, 842-845
- Federal Loan Agency, 370, 373-374
- Federal Security Agency, 369-372
- Federal supremacy, 64-69
- Federal Works Agency, 370, 372-373
- Fergus v. Marks, 701
- Ferguson, Miriam A., Governor, letter with respect to extradition, 102-103
- Field, Stephen J., Justice, on privileges and immunities, 103-104; on constitutionality of income tax, 500-501; on police power, 838-839
- Fifteenth amendment, 168, 173
- Filibuster, in Congress, 455-457
- Finance, methods of, in states, 746, 749-750, 769-771, 812-837
- Fletcher, Henry P., Chairman of Republican National Committee, 231
- Floor leader, in Congress, 433, 434, 436, 446, 478; in state legislatures, 711
- Football case, University of Georgia, and taxation of governmental instrumentalities, 519
- Force Acts, 173
- Foreign affairs, control of, 611-614
- Foreign service, 272-274, 622-626
- Formal and fundamental constitutional provisions, doctrine of, 634, 638-643
- Fourteen Points, of President Wilson, 618
- Fourteenth amendment, and citizenship, 74-77; and freedom of press, 81-88; and freedom of speech, 88-91; and white primary, 168-169; and police power, 838-842; and minimum wage legislation, 846-850
- Frankfurter, Felix, Justice, on taxation of governmental instrumentalities, 531-534
- Franklin, Benjamin, and Albany plan, 4; and declaration of independence, 23; and plan of confederation, 27
- Freedom of speech and press, 80-91
- Funds, state, custody of, 812-815
- Garfield, James A., President, inability of, 210, 211
- Garner, John N., Vice President, as member of Cabinet, 327
- General Accounting Office, 555-570
- Georgia Football case, and taxation of governmental instrumentalities, 519
- Germany, policy with respect to, 594-595
- Gibbons v. Ogden, 571-573
- Gillett, F. H., Senator, on confirmation of Cabinet appointments, 309-310
- Giovanni di Santo v. Pennsylvania, 582-584

- Good neighbor policy, 586, 590  
 Government Reports, office of, 294, 296, 298  
 Governmental instrumentalities, taxation of, 519-534  
 Governor, power with respect to constitutional convention, 678-679; relation to legislative council, 743-744, 758; initiative in legislation, 746, 756-758; call for special session, 747-749; veto power of, 749-756; burdens of, 759-764; administrative power of, 765-771, 774-786; power with respect to budget, 818-824  
 Grandfather clauses, 168  
 Grand jury, 806-809  
 Grants-in-aid, federal, 373, 842-845  
 Graves v. New York ex rel. O'Keefe, 522-534  
 Grove v. Townsend, 168  
 Guild, Frederic H., on the legislative council, 736-745  
 Hadley, Herbert S., on reform of judicial procedure, 794-797  
 Hague v. Committee for Industrial Organization, 81, 88-91  
 Hamilton, Alexander, proposes plan of union, 39; on constitutional construction, 69; on veto power, 275-278  
 Hammer v. Dagenhart, 579-582  
 Hancock, John, and declaration of independence, 23  
 Hanford, A. C., on legislative procedure in Massachusetts, 706-712  
 Hanna, Marcus A., and patronage, 248-249  
 Harding, Warren G., President, nomination of, 243-245; and patronage, 250-251; and law enforcement, 268-269; and administrative reorganization, 352; and merit system, 383; and taxation of governmental instrumentalities, 519  
 Hare-Hawes-Cutting Act, 650  
 Harlan, John M., Justice, on rule of reason, 576-577; on doctrine of incorporated and unincorporated territory, 637-638; on doctrine of formal and fundamental constitutional provisions, 642-643  
 Harris, Joseph P., on social security, 842-845  
 Hatch Act, 154-156  
 Hawke v. Smith, 59-60  
 Hay, John, Secretary of State, open door policy of, 614-615  
 Hayes, Rutherford B., President, protest against riders, 282-284  
 Health, federal agency for, 370, 371  
 Hitchcock, Gilbert M., Senator, letter respecting inability of President Wilson, 214-215  
 Holmes, Oliver Wendell, Justice, on white primary, 168-169; on federal regulation of child labor, 580-582; on police power, 839-842  
 Hoover, Herbert, Secretary of Commerce, and Colorado River compact, 108, 111; President, and administrative reorganization, 352; and merit system, 383; and congressional reapportionment, 424-426; recommendations with respect to control of accounting system, 568; veto of Philippine independence, 650  
 House of Representatives, resolution with respect to third term, 207, 210; report on Cabinet seats in Congress, 333; seating of members in, 407; reapportionment of, 421-429; party caucuses in, 433-437; revolution in, 437-442; selection of committees in, 443-447; debate rules in, 457-458; work of, 482-483  
 Housing, federal agencies for, 372, 373, 374  
 Hughes, Charles E., Governor, plan for primary, 161, 166; recommends administrative reorganization in New York, 774; Secretary of State, cancellation of Lansing-Ishii agreement, 592, 593-594; Chief Justice, letter with respect to judicial reorganization, 513-518; on constitutionality of minimum wage legislation, 846-850  
 Hull, Cordell, Secretary of State, letter with respect to Ohio tax on imported wines, 100-101; departmental order with respect to neutrality, 274-275  
 Hull, Morton D., on administration measures in Illinois, 756-758  
 Humphrey case, 258, 264-267  
 Illinois, interstate cooperation by, 122-124; primary law of, 137-145; party slate-making in, 161-164; suffrage qualifications in, 172-173; public policy law of, 187-188; law with re-

- spect to presidential electors, 221-225; presidential primary in, 232-233; resolution of legislature with respect to seating of Frank L. Smith, 408-410; reapportionment in, 422, 426-429, 701; University of, and taxation of governmental instrumentalities, 519; constitutional conventions in, 671-672, 677-685; minority representation in, 702; special legislation in, 705-706; legislative organization and work in, 725-735; financial methods in, 746, 749-750, 769-771, 824-837; special session, 747-749; item veto in, 749-750; administration measures in, 756-758; administrative reorganization in, 765-771
- Immigration, veto of bill restricting, 279-281
- Impeachment, 338
- Implied powers, 69-74
- Inability, presidential, 211-217
- Income Tax cases, 500-501
- Incorporated and unincorporated territory, doctrine of, 634-638
- Independence, Declaration of, 23-27; of Philippines, 650-667
- Initiative and referendum, 58, 61, 178-198
- Injunctions, 511-512
- Instruction, of members of Congress, 429-432
- Insular cases, 634-643
- Interior, department of, 370, 372
- Interstate commerce, scope of power over, 571-574; rule of reason with respect to, 574-577; relation to intrastate commerce, 577-578; relation to police power, 578-584
- Interstate Cooperation, Commission on, 118, 122-125
- Interstate Reference Bureau, 122
- Investigations, congressional, 338-343
- Invisible government, 135, 136-137
- Item veto, by President, 281-285; by governor, 749-756, 824
- Jackson, Andrew, President, protest against Senate resolution of censure, 335-338
- Japan, San Francisco school question concerning, 95-100; Lansing-Ishii agreement with, 591, 593-594; non-recognition of conquests by, 615-616
- Jefferson, Thomas, on origin of committees of correspondence, 13-14; as author of declaration of independence, 23; on constitutional construction, 69; on war referendum, 195; on third term, 207, 208-209; on Vice President as member of Cabinet, 327, 328; plan for government of territories, 628
- Johnson, Andrew, President, and removal power, 258
- Joint Committee on Reorganization, 352
- Jones Act, 650
- Judicial council, national, 506; state, 810-811
- Judicial review, constitutional basis of, 490-494; extent of, 494-500; relation to social policy, 500-504; proposals for modification of, 504-505, 511-513
- Judiciary, federal, power of Congress over, 484-488; appointments to, 488-490; review of legislation by, 490-505; reorganization of, 505-518; state, position of judge in, 785-788; selection of judges, 788-793; procedure of, 794-797; newer types of courts, 797-806
- Judiciary Act, 484, 490
- Judiciary committee, of Senate, report on appointment of members of Congress to public office, 418-421; on extent of judicial review, 494-500
- Jury, in Philippines, 634, 638-643; grand, 806-809
- Jus soli, 74
- Kansas, legislative council in, 736-745
- Kellogg Pact, for outlawry of war, 594, 617, 626-627
- Kidnapping, federal law with respect to, 117, 119-121
- Ku Klux Klan Act, 173
- Labor, department of, 370
- LaFollette, Robert M., Sr., Senator, on war referendum, 195; on removal of Secretary Denby, 320-325; proposal with respect to judicial review, 505
- LaFollette, Robert M., Jr., Senator, on war referendum, 196-198; resolution with respect to third term, 207, 210; report on extension of merit system to postmasters, 392-396
- LaGuardia, Fiorello H., Mayor, on conflicting taxation, 538-546
- Lame Duck amendment, 217, 423

- Lansing-Ishii agreement, 591-592, 593-594
- Law, enforcement of, 267-270
- Lawrence, David, on inability of President Wilson, 211-214
- League of Nations, Senate reservations to, 618-622
- Lee, Frederic P., on the Legislative Counsel, 466-479
- Lee, Richard Henry, and declaration of independence, 23
- Leek, J. H., on legislative reference bureaus, 720-725
- Legislation, in Congress, amount of, 479-483; in states, special, 705-706, 712; initiative of governor, 746, 756-758
- Legislative council, in states, 736-745, 758
- Legislative counsel, for Congress, 462, 466-479
- Legislative reference service, interstate, 122; in Library of Congress, 462-466; in states, 719-725
- Legislature, applications for national constitutional convention, 48-51; relation to initiative and referendum, 193-194; right to instruct members of Congress, 430-431; power with respect to state constitution, 672-677, 679-682; organization of, 694-704; work and methods of, 705-745; legislative council in, 736-745, 758; special session of, 747-749; power with respect to budget, 818-824
- Lehman, Herbert H., Governor, on conflicting taxation, 535-538
- Lewis, David J., reappointment to Tariff Commission, 344-346
- Library of Congress, legislative reference service in, 462-466
- Lincoln, Abraham, President, and patronage, 246-248
- Lindbergh law, 117, 119-121
- Literacy test, for voting, 170; for immigrants, 279-281
- Livingstone, Robert R., and declaration of independence, 23
- Loans, federal agencies for, 370, 373-374
- Lobby, in Congress, 454; in state legislatures, 713-719
- Lochner v. New York, 839-840
- Lodge, Henry Cabot, Senator, on administration measures, 289-290; as floor leader in Senate, 478; on Supreme Court appointments, 489-490; resolution with respect to Monroe Doctrine, 586, 589; reservations to League of Nations, 618-622
- Logan, M. M., Senator, report on extension of civil service to postmasters, 392-396
- Longworth, Nicholas, Representative, nominated for Speaker, 436
- Louisiana, reasonable understanding provisions in, 169-171
- Lowden, Frank O., Governor, presidential nomination of, 235; proclamation with respect to constitutional convention in Illinois, 678-679; on administrative reorganization in Illinois, 765-771
- Ludlow, Louis, Representative, proposal for war referendum, 196
- Lump sum appropriations, 831-832, 835-836
- Luther v. Borden, 62-64
- McCarl, J. R., Comptroller General, on powers and position of Comptroller General, 557-561
- McCray v. United States, 547-549
- McCulloch v. Maryland, 69-74, 519
- McGoldrick, Joseph, on cabinet system in New York, 771-774
- McGrain v. Daugherty, 341-343
- McKellar, Kenneth, Senator, report on extension of merit system to postmasters, 389-392
- McKinley, William, President, and patronage, 248-249
- Macdonald, A. F., on trend of state expenditures, 815-818
- Maclay, William, Senator, on instruction of members of Congress, 430
- Madison, James, and Virginia Plan, 38; on republican government, 61-62; and Marbury case, 490
- Magdalena Bay Resolution, with respect to Monroe Doctrine, 586, 589
- Mahan v. Hume, 428
- Manchukuo, non-recognition of, 615-616
- Manchuria, policy with respect to, 615-616
- Mandel, Arch, on burdens of governor, 763-764
- Marbury v. Madison, 491-494
- Marshall, John, Chief Justice, on implied powers, 69-74; on application of bill of rights, 77-80; on power of



- taxation, 519; on judicial review, 491-494; on meaning of commerce, 571-573
- Marshall, Thomas R., Vice President, on presidential succession, 215-217; as member of Cabinet, 327, 329-330
- Maryland, budget system in, 752, 753-754, 818-822
- Massachusetts, ratification of Constitution, 44-46; and interstate compacts, 104-107; initiative and referendum in, 178, 179-187; presidential primary law of, 233-235; constitutional convention in, 685-693; legislative procedure in, 706-712; budget system in, 752, 754-755; administrative reorganization in, 781
- Mayflower Compact, 3
- Mellon, Andrew W., Secretary of the Treasury, on congressional investigations, 339-340
- Merchant Marine Act, 268-269
- Merit system, establishment of, 376-383; extension of, 383-388; working of, 388-406
- Minimum Wage, compact concerning, 112-117; cases, 502, 845-850
- Minister without portfolio, Vice President as, 327
- Minnesota Press case, 81-88
- Minnesota Rate cases, 577
- Minority presidents, 225-226
- Minority representation, in Illinois, 702
- Missouri, judicial procedure in, 794-797
- Model constitution, state, 758
- Monroe Doctrine, 586-591
- Montana, enabling act for, 91-95
- Moran v. Bowley, 426-429
- Morehead v. New York ex rel, Tipaldo, 845
- Moses-Linthicum Act, 622-626
- Mt. Vernon convention, 35
- Munitions, control of, 594, 607-609
- Myers case, 258-264
- National committee, 157-161, 226-231
- National convention, 226-232, 235-245
- National Municipal League, plan for model state constitution, 758
- National Resources Committee, 293, 294, 295-296, 297, 298, 369
- National supremacy, doctrine of, 64-69
- National Youth Administration, 370, 371
- Near v. Minnesota, 81-88
- Nebraska, unicameral legislature in, 694-700
- Necessary and proper clause, 69
- Neutrality, policy of, 196-198, 274-275, 594-611
- Nevada, admission of, 246-248
- Newberry, Truman H., Senator, contested seat of, 407
- Newberry v. United States, 145-148
- New England Confederation, 3-8
- New Jersey Plan, 39, 41-44
- New Mexico, admission of, 422
- New York, ratification of Constitution, 46-48; resolution of legislature on instruction of members of Congress, 430-431; budget system in, 751, 753, 819, 822-824; administrative reorganization in, 771-781, 782-784; minimum wage legislation in, 845
- Nineteenth amendment, 168
- Nixon v. Condon, 168
- Nixon v. Herndon, 168-169
- Nomination, of state officers, 161-167; of president, 226-245
- Non-entanglement, policy of, 585-586
- Non-recognition, policy of, 615-616
- Norris, George W., Representative, resolution with respect to House rules, 438; Senator, on composition of conference committee, 451; on unicameral legislature, 697-700
- North Dakota, enabling act for, 91-95; power of legislature with respect to constitutional revision, 672-677; conciliation courts in, 803-804
- Northwest Ordinance, 628-633
- Ohio, selection of judges in, 788-792
- Oil leases, 269-270
- Oleomargarine case, 546-549
- O'Mahoney, J. C., Senator, report on extension of merit system to postmasters, 392-396
- Omnibus Enabling Act, 91-95
- Open Door policy, 614-615
- Ordinance power, 270-275
- Oregon, primary law of, 135-136; recall in, 199; plan for unicameral legislature in, 694
- Organic Act, for District of Columbia, 643-646
- Outlawry of war, 594, 617, 626-627
- Pan American conference, at Buenos Aires, and Monroe Doctrine, 586, 591
- Parks, federal agency for, 372

- Parliamentary system, 331
- Party, importance of, 131-134; legal position of, 134-145; federal regulation of, 145-156; regulation of national organization, 157-161; slate-making by, 161-167; caucus in Congress, 433-437, 443
- Paterson, William, and New Jersey Plan, 39, 41
- Patronage, presidential, 246-251
- Paul v. Virginia, 103-104
- Pendleton Act, with respect to civil service, 376-380
- Pennsylvania, budget system in, 751, 754
- Pensacola Telegraph Co. v. Western Union Telegraph Co., 573-574
- Personnel, management of, 293, 294, 296, 369, 380-383, 387-388, 396-406
- Philippines, disposition of, 592; jury trial in, 638-643; status of, 650-667
- Police power, 546-552, 578-584, 838-842
- Political parties, 131-167
- Poll tax, as requirement for voting, 168, 171
- Pollock, James K., Jr., on regulation of lobbying, 713-717
- Pollock v. Farmers' Loan and Trust Co., 500-501
- Port of New York Authority case, and taxation of governmental instrumentalities, 519
- Porto Rico, cession of, 592; status of, 634-638
- Postmasters, and civil service, 383, 384, 389-396
- President, election of, 207, 217-226; nomination of, 226-245; power of appointment, 246-251, 300-315, 343-346, 383, 385-396; power of removal, 258-267, 315-327; power of law enforcement, 267-270; ordinance power of, 270-275; veto power of, 275-287; and administration measures, 287-291; office organization of, 291-298, 368-369; power over administration, 335-338, 343-375; extension of merit system by, 383, 385-388; power with respect to foreign affairs, 611-614
- President's Committee on Administrative Management, report on White House organization, 291-293; on administrative reorganization, 346-357; on personnel management, 396-406; on accounting procedure, 561-570
- Presidential ballot, 217-225
- Presidential electors, 217-225
- Presidential inability, 211-217
- Presidential primary, 232-235
- Presidential Succession Act, 210-211
- Press, freedom of, 88-91
- Primary, Oregon law, 135-136; Illinois law, 137-145; South Dakota law, 164-167; for selection of national committee, 160; white, 168-169; presidential, 232-235
- Privileges and immunities, 81, 90, 103-104
- Procedure, legislative, 706-712; judicial, 794-797
- Proclamations, by President, 271-272, 595-599; by governor, 678-679, 747-749
- Proctor, for federal judiciary, 510
- Progressive party, proposals for judicial review, 504-505
- Prohibition, repeal of, 52-58; enforcement of, 268; war-time, 271-272
- Protocol, with Spain, 591-593
- Public Health Service, 370, 371
- Public Policy law, in Illinois, 187-188
- Public Works Administration, 372, 373
- Puerto Rico, see Porto Rico
- Quarantine, of aggressors, 616-618
- Railroad Commission of Wisconsin v. Chicago, Burlington and Quincy Railroad Co., 578
- Ramspeck Act, 384
- Randolph, Edmund, and Virginia Plan, 39
- Rathbun v. United States, 258, 264-267
- Ratification, of U. S. Constitution, 44-48; of amendments, 52-60
- Reapportionment, of Congress, 421-429; of state legislatures, 701
- Reason, rule of, with respect to trusts, 574-577
- Reasonable understanding clauses, 168, 169-171
- Recall, of officers, 199-204; of judicial decisions, 504-505
- Recess appointment, 300, 314-315
- Reconstruction Act, and judicial review, 504
- Reconstruction Finance Corporation, 374
- Reed, Stanley, Justice, as chairman of Committee on Civil Service, 385
- Reed, Thomas B., as Speaker, 437



- Referendum, on amendments to U. S. Constitution, 58-60; and initiative, 178-195; on war, 195-198
- Removal power, 258-267, 278-279, 315-327
- Rendition, interstate, 102-103, 118-119
- Reorganization, of national administration, 346-375; of civil service, 396-406; of federal judiciary, 505-518; of state administration, 765-784
- Reorganization Act, 293, 352, 358-364
- Reports, government, 294, 296, 298
- Republican government, 61-64
- Republican party, national committee of, 157-159; national convention of, 227-231, 235-239, 243-245; caucus in Congress, 436-437, 443
- Retirement, of judges, 506, 508-511
- Revolution of 1910-11, 437-442
- Rhode Island, constitutional convention in, 671
- Richards primary, 161, 164-167
- Riders, 281-285
- Rights of Englishmen, 4, 11-12, 17-19
- Roads, federal agency for, 372, 373
- Roberts, Floyd H., Judge, and senatorial courtesy, 252-257
- Roberts, Owen J., Justice, on constitutionality of minimum wage legislation, 845-846
- Robinson, Joseph T., Senator, resolution with respect to removal of Secretary Denby, 316-317
- Rogers Act, 622
- Roosevelt, Franklin D., President, on federal crime control, 121-122; on war referendum, 198; on senatorial courtesy, 252-257; and removal power, 258; and veto power, 281, 285, 286-287; and White House reorganization, 293-298; and administrative reorganization, 352-358, 365-375; and merit system, 383, 385-388; and judicial reorganization, 506-513; and taxation of governmental instrumentalities, 519-522; policy with respect to Monroe Doctrine, 586, 590-591; proposal for quarantining aggressors, 615, 616-618; and Philippine independence, 650
- Roosevelt, Theodore, President, and third term, 207, 209; on Supreme Court appointments, 489; on judicial review, 502-505; interpretation of Monroe Doctrine, 586, 588-589
- Root, Elihu, on the San Francisco school question, 96-100; on invisible government, 136-137
- Round-robin, in Senate relative to Armed Merchant Ship Bill, 455
- Rule of reason, 574-577
- Rules, revolution in House concerning, 437-442; with respect to selection of Senate and House committees, 442-443; with respect to debate, 457-462
- San Francisco school question, 95-100
- Security, federal agency for, 269-372; social, 842-845
- Senate, resolution with respect to third term, 207, 210; investigation into inability of President Wilson, 214-215; and patronage, 246; senatorial courtesy in, 251-258; and Cabinet appointments and removals, 300-327; report on Cabinet seats in Congress, 333; resolution with respect to removal of bank deposits, 335; investigations by, 338-343; report on merit system for postmasters, 389-396; power with respect to seating of members, 407-413; report on appointment of members of Congress to public office, 418-422; view concerning instruction of members, 430; selection of committees in, 442, 443-446; filibustering in, 455-457; debate rules in, 458-462; report on extent of judicial review, 494-500; resolution with respect to Monroe Doctrine, 586, 589; reservations to League of Nations, 618-622
- Senatorial courtesy, 251-258
- Separation of powers, and Cabinet seats in Congress, 331
- Seventeenth amendment, 48
- Seward, William H., on Supreme Court appointments, 488
- Sherman Anti-Trust act, 574
- Sherman, Roger, and declaration of independence, 23
- Ship subsidy bill, special rule concerning, 458
- Short ballot, 771, 780, 790
- Shreveport case, 577-578
- Sikes, P. S., on judicial councils, 810-811
- Simmons, F. M., Senator, on conference committee, 450-451, 452-454
- Sixteenth amendment, 519-520

- Slate-making, 161-167
- Small, Len, Governor, on refusal of Senate to seat Frank L. Smith, 412-413; special message of, 746; vetoes by, 749-750
- Small claims court, 797-800
- Smith, Alfred E., Governor, on burdens of governor, 759-763; and administrative reorganization in New York, 771-774
- Smith, Frank L., refusal of Senate seat for, 407-413
- Smith, Reginald Heber, on newer types of courts, 797-806
- Smoot, Reed, Senator, appointment to World War Foreign Debt Commission, 413-421
- Social security, 369-372, 842-845
- South Carolina, party instructions to members of Congress, 432
- South Dakota, enabling act for, 91-95; proposal conventions in, 164-167; initiative and referendum in, 178-179
- Spain, protocol with, 591-593
- Speaker, and presidential succession, 210; nomination of, 436; power, 437-442, 443
- Special legislation, 705-706, 712
- Special rules, in House, 457, 458
- Special session, of legislature, 747-749
- Speech, freedom of, 80-88
- Split session, 702-704
- Spoils system, 376, 389-396
- Springer, William M., Representative, resolution with respect to third term, 207, 210
- Stamp Act Congress, 4, 11-12
- Standard Oil Company case, 574
- Stimson, Henry L., Secretary of State, and doctrine of non-recognition, 615-616
- Stone, Harlan F., Justice, on taxation of governmental instrumentalities, 522-530; on doctrine of direct and indirect interference, 583-584
- Subsidies, federal, 842-845
- Succession, presidential, 210-217
- Suffrage, control of, 168-171; qualifications for, 171-173; in District of Columbia, 646-649
- Supreme Court, composition of, 484; appointments to, 488-490; review of legislation by, 490-505; proposal for reorganization of, 505-518
- Sutherland, George, Justice, on arms embargo, 611-614
- Taft, William H., President, on recall of judges, 199; on Cabinet seats in Congress, 332-334; and administrative reorganization, 352, 365; Chief Justice, on removal power, 258-264; on judicial review, 502; on constitutionality of child labor, 550-552
- Tariff Commission, control of, 344-346
- Taxation, by state, and trade agreements, 100-101; as voting qualification, 168, 171; of governmental instrumentalities, 519-534; conflicting, 535-546; relation to police power, 546-552
- Teapot Dome case, 269-270, 315-327
- Tenure-of-Office Act, 258, 319-320
- Territories, government of, 628-667
- Texas White Primary case, 168-169
- Third term tradition, 207-210
- Tilson, John Q., Representative, as floor leader in House, 436, 446
- Toll, Henry W., and Council of State Governments, 122
- Trade agreements, 95, 100-101, 286-287
- Trade barriers, interstate, 125-128
- Treasury department, 368, 370, 371, 372, 373
- Treaties, and state law, 95-101
- Trusts, regulation of, 574-577
- Twentieth amendment, 217, 423
- Twenty-first amendment, ratification of, 52-58
- Two-term tradition, 207-210
- Two-thirds rule, in Democratic conventions, 235
- Tydings-McDuffie Act, 650-662
- Tyson v. Banton, 841-842
- Unanimous consent, in Senate, 459
- Underwood, Oscar W., Senator, on composition of conference committee, 448-450
- Unemployment, agencies for dealing with, 369, 370
- Unicameral legislature, 694-700, 758
- Unit rule, in Democratic conventions, 235
- United States Bank, constitutionality of, 69-74; removal of deposits from, 335-338
- United States v. American Tobacco Co., 575-577

- United States v. Curtiss-Wright Export Corporation, 611-614
- United States v. Wong Kim Ark, 75-77
- Vandenberg, Arthur H., Senator, on item veto, 284-285
- Versailles, treaty of, 618-622
- Veto, by President, 121-122, 275-287; by governor, 178-179, 187, 749-756
- Vice President, and third-term tradition, 207, 209; and presidential succession, 210, 211-212, 215-217; as member of Cabinet, 299, 300, 327-331
- Virginia Plan, 38-41
- Vocational education, 371
- Voting, qualifications for, at primary, 144-145, 168-169; at elections, 169-173
- Voting machine, 177
- Waite, Morrison R., Chief Justice, on doctrine of expanding power, 573-574
- Walsh, Thomas J., Senator, on confirmation of Cabinet appointments, 300-304; on appointment of members of Congress to public office, 418-421
- War, referendum on, 195-198
- Warren, Charles B., rejected by Senate as Attorney General, 300-315
- Washington, George, on political parties, 131-133; on third term, 207-208; on policy of non-entanglement, 585-586; proclamation of neutrality, 594, 595-596
- Washington, city, government of, 643-649
- Washington, state, enabling act for, 91-95; minimum wage legislation in, 845-850
- Wells, R. H., on item veto and state budget, 750-756
- West, Victor J., on split session in California, 702-704
- West Coast Hotel Co. v. Parrish, 846-850
- West Virginia Contract case, and taxation of governmental instrumentalities, 519
- White, Edward D., Justice, on taxation and police power, 547-549; on doctrine of incorporated and unincorporated territory, 636-637; Chief Justice, on federal regulation of political parties, 147-148; on rule of reason, 574-576
- White House, organization of, 291-298
- White primary, 168-169
- Williams, John Sharp, Senator, on filibustering, 455-457
- Wilson, Woodrow, President, inability of, 211-217; and removal power, 258; and enforcement of anti-trust law, 267; proclamation with respect to war-time prohibition, 271-272; vetoes by, 278-281; extension of merit system by, 383; interpretation of Monroe Doctrine by, 586, 589; proclamation of neutrality, 596-599; and League of Nations, 618; and Philippine independence, 650
- Wine, Ohio tax on, and trade agreements, 100-101
- Wisconsin, application of legislature for national constitutional convention, 51; anti-lobbying law of, 713, 714, 715, 717-719
- Wisconsin Railroad Commission case, 578
- Wong Kim Ark case, 75-77
- Wood v. Broom, 428
- Works, federal agency for, 372-373
- Works Progress Administration, 370, 371, 372, 373
- World War Foreign Debt Commission, appointment of members of Congress to, 413-421
- Wright, Omar H., Director of Finance, on financial methods in Illinois, 824-837
- Youth, federal agency for, 370, 371

